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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ANTHONY BROOKS,

Petitioner

-against-

WALTER D. ZANT,
Superintendent
Georgia Diagnostic
Classification
Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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QUESTIONS PRESENTED

(1) Whether the trial count's failure to grant petitioner's motion for a change of venue, in the face of overwhelming prejudicial pretrial publicity, denied petitioner a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

(2) Whether the pronounced and persistent misconduct by the prosecutor's in his closing argument during the sentencing phase of petitioner's capital trial violated petitioner's Eighth and Fourteenth Amendment rights?

(3) Whether the penalty of death is invalid in light of the failure of the trial court to properly guide the discretion of the jury as required by the Eighth and Fourteenth Amendments of the Constitution?

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
How the Federal Question Was Presented and Decided Below	6
Reasons for Granting the Writ	7
I. This Court should review the decision below to correct the denial of a request for a change of venue in the face of overwhelming prejudicial pretrial publicity	7
II. This Court should review the decision below to determine minimum standards which the prosecution must satisfy in making its closing argument in the sentencing phase of a capital case	12
III. The Georgia courts continue to construe its death penalty statute in a vague and overboard manner in conflict with applicable decisions of this Court	16
Conclusion	20

Page

Appendix

Opinion of the Superior Court of Butts County..... 1a

Order of the Georgia Supreme Court denying application for probable cause to appeal..... 26a

Order of the Georgia Supreme Court denying Motion to reconsider denial of application for probable cause to appeal..... 27a

Affiddavit of Dr. Lawrence E. Noble, Jr..... 28a

Closing Argument of Prosecutor During Sentencing Phase of Petitioner's Trial..... 42a

TABLE OF AUTHORITIES

CASES

	Page(s)
Alim v. Smith, 474 F. Supp. 54 (W.D.N.Y. 1979).....	12
Berger v. United States, 295 U.S. 78 (1935.....	14
Brown v. Estelle, 468 F. Supp. 42 (N.D. Tex. 1978), aff'd, 591 F.2d 372 (5th Cir. 1978....	12,13,15
Commonwealth v. Clark, 185 A.2d 764 (Pa. 1936).....	15
Embry v. State, 214 So.2d 567 (Ark. 1969).....	12
Finny v. G.C. Murphy Co., 161 A.2d 385 (Pa. 1960)....	15
Furman v. Georgia, 408 U.S. 238 (1972).....	17,18,19
Gates v. State, 244 Ga. 587, 261 S.E. 2d 349 (1979).....	19
Gardner v. Florida, 430 U.S. 349 (1977).....	12,16
Gilbert v. State, 536 P.2d 929 (Okla. Crim. App. 1975).....	12
Godfrey v. Georgia, 446 U.S. 420 (1980).....	4,17,18,19
Gregg v. Georgia, 428 U.S. 153 (1976).....	12,17,18,19
Hall v. United States, 419 F.2d 582(5th Cir. 1969)...	13
Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978).....	12
Irvin v. Doud, 366 U.S. 717 (1961).....	10,11
Lufkin v. City of Bakersfield, 20 P.2d 788, (Cal. Ct. App. 1933).....	15
McGautha v. California, 402 U.S. 183 (1971).....	14
People v. Bernette, 197 N.E. 2d 436 (Ill. 1964).....	15
People v. Love, 17 Cal Rptr. 481, 366 P.2d 809.....	12
People v. White, 72 Cal. Rptr. 873, 446 P.2d 993.....	14
Presnell v. Georgia, 439 U.S. 14 (1979).....	19
Rideau v. Louisiana, 373 U.S. 723 (1963).....	10,11
Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).....	19
Sier v. State, 417 P.2d 803 (Okla. Crim. App. 1973).....	15
State v. Jordon, 294 P.2d 677 (Ariz. 1956).....	15
State v. Jones, 251 S.E. 425 (N.C. 1979).....	14
State v. Mount, 152 A.2d 343 (N.J. 1959).....	14

State v. Owen, 253 P.2d 203 (Ida. 1953), overruled in part of other grounds, 486P.2d 84 (Ida. 1971)..... 15

Tumey v. Ohio, 273 U.S. 510 (1927)..... 15

United States ex rel. Clark v. Fisk, 538 F.2d 750 (7th Cir. 1976), Cert. denied,429 U.S. 1064 (1977)..... 14

United States v. Chrisco, 493 F.ed 232 (8th Cir.), cert denied, 419 U.S. 847 (K74)..... 14

United States v. Somers, 496 F.2d 723 (3rd Cir.), Cert. denied, 419 U.S. 832 (1974)..... 14

West v. State, 150 S.W. 2d 363 (Tex Ct. Civ. App 1941)..... 15

Williams v. Henderson, 451 F. Supp. 328 (E.D.N.Y. 1978)..... 15

White v. State, 492 S.W.2d 488 (Tex. Ct. Crim App. 1975)..... 12

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 19

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution
Sixth Amendment..... 2

United States Constitution
Eighth Amendment..... 2

United States Constitution
Fourteenth Amendment..... 2

28 U.S.C. 1257 (3) (1976)..... 2

Ga. Code Ann. 26-3102..... 18

Ga. Code Ann. 27-2534.1(b) (2)..... 2,16

Ga. Code Ann. 27-2534.1(b) (7)..... 2,16

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OPINION BELOW

The decision of the Superior Court of Butts County is appended to this petition at 1a. It was not reported. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, three judges dissenting, thereby declining to review the decision of the Superior Court of Butts County. The order of the Georgia Supreme Court denying the application and a motion to reconsider the denial are appended at 26a and 27a.

JURISDICTION

The decision of the Superior Court of Butts County was entered February 2, 1982. Petitioner sought review of the decision by the Supreme Court of Georgia. That court denied an application for probable cause to appeal on April 21, 1982. Appendix at 26a. The Supreme Court of Georgia also denied an application for reconsideration of its denial on May 18, 1982. Appendix at 27a. Said denial of an application for probable cause to appeal operates to deny petitioner any review of the decision of the Superior Court of Butts County by a state court of Georgia. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed,.....

The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution provides in relevant part:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law..."

This case also involves the second and seventh aggrevating circumstance of Georgia's death penalty statue, Ga. Code Ann 27-2534.1(b) (2) and (b) (7), which provide for the death penalty where:

> (b) (2) The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony. . .
>
> (b) (7) The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggrevated battery to the victim.

STATEMENT OF THE CASE

William Anthony Brooks asserts that he was convicted of murder, kidnapping, rape and armed robbery and sentenced to death in the Superior Court of Muscogee County in violation of rights guaranteed by the Constitution of the United States, and asks that this Court review the denial of his petition for a writ of habeas corpus and vacate his conviction and sentence.

The charges against Mr. Brooks arose out of the abduction of Carol Jeanette Galloway, a piano teacher and director of the chior at the Methodist Church, from her home on July 15, 1977. Because of the prominence of Ms. Galloway and fact that her murder was the twenty-third non-domestic murder which occurred in the Columbus area in a twenty-month period, news of the incident received extensive and sensational coverage in the local media. The abduction of Ms. Galloway, the search for her, the discovery of her body, the reaction of her family and friends, her funeral, the investigation of the crime, the search for the killer, the arrest of Mr. Brooks in Atlanta on August 11, 1977, his return to Columbus for trial and various pretrial proceedings in the case were very prominently covered in the local newspapers, radio and television.

Some of the pretrial publicity was presented to the trial court, the Honorable John Land presiding, at a hearing on a motion for a change of venue held on September 30, 1977. The trial judge, while agreeding at the conclusion of the hearing that "this is one that should not be tried in Muscogee County," Tr. of September 30 hearing at 34, nevertheless denied the motion, but promised an extensive voir dire.

The trial was the first criminal trial in Georgia in which television and other cameras and recording equipment were permitted in the courtroom. Although 25 to 50 percent of the population of the county in which petitioner was tried were of the same race as petitioner, no members of his race were on the jury. Report of the

Trial Judge to the Supreme Court of Georgia at 6, Section E.

At the conclusion of the trial the jury returned verdicts of guilty as to all four offenses. Following the verdict, a sentencing hearing was conducted. The state produced only one witness, a probation officer who testified that the peitioner's reputation was bad. Tr. 838-840. The defense presented petitioner's mother and two sisters who attempted to testify about his premature birth and the abuse he received as a child from his stepfather admit frequent objections by the prosecutor and admonitions by the court. Tr. 841-58.

The jury was instructed that it could impose death if it determined that the offense of murder was committed while petitioner was engaged in the commission of either or both of two other capital felonies, rape and armed robbery, Ga. Code Ann. Sec. 27-2534.1(b)(2), or if the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim." Tr. at 885-86 [emphasis added]. The jury recommended death, stating its finding of the following aggravating circumstances: "armed robbery, and rape, and the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim." Tr. at 980 [emphasis added].

The Supreme Court of Georgia upheld the conviction and sentence upon direct appeal. Brooks v. State, 244 Ga. 274, 261 S.E.2d 379 (1979). This Court vacated and remanded for further consideration in light of its decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Brooks v. Georgia _____ U.S. _____, 64 L.Ed.2d 821 (1980). On remand, the Supreme Court of Georgia reaffirmed the death penalty. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980). This Court denied certiorari. ___ U.S. ___, 68 L.Ed 2d 312 (1981).

Thereafter, Mr. Brooks filed the petition for a writ of habeas corpus in the Superior Court of Butts County. A hearing on the

petition was conducted in November 12, 1981. Petitioner presented the testimony of three expert witnesses to support his claim that the trial court erred in not granting his motion for a change of venue; that the voir dire conducted during jury selection was wholly inadequate to feret out community prejudices against him; and that the death penalty was being applied in the State of Georgia in an arbitrary and capricious manner.

The Superior Court of Butts County entered an order on February 2, 1982, denying the petition for a writ of habeas corpus. Petitioner filed a timely notice of appeal on February 10th before the Georgia Supreme Court. That court declined to review petitioner's case, three judges dissenting.

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioner alleged in paragraph 10-15 of his petition for a writ of habeas corpus that the trial judge erred in not granting petitioner's timely motion for a change of venue. Petitioner alleged that this denial precluded any meaningful opportunity to receive a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. At the hearing before the Butts CountySuperior Court, petitioner further presented expert opinion, exhibits and later filed a detailed legal memorandum addressing this issue. The Butts County Court denied this claim, finding that the issue had already been addressed by the Georgia Supreme Court on direct appeal. The court further found that the new evidence offered by petitioner amounted to merely "an opinion that the trial court was wrong." See Appendix 5a-6a.

In paragraphs 48-50 of his petition, petitioner alleged that the closing argument given by the prosecutor offended his Eighth and Fourteenth Amendment rights in numerous respects. Petitioner filed before the Butts County court legal memoranda which listed at least seven examples of grossly improper argument, any of which standing alone violated petitioner's rights. In its review, the Butts County court found that the argument, as a whole, did not sway the passions of the jury and ruled that it was not improper. See Appendix at 18a-19a.

In paragraphs 51-58, petitioner alleged that the failure of the trial court to properly guide the discretion of the jury with clear instruction offended his Eighth and Fourteenth Amendments in support of this contention. The Butts County court rejected this contention on the basis of the holding of the Georgia Supreme Court on direct appeal. See Appendix at 20a-21a.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE TRIAL COURT'S FAILURE TO GRANT PETITIONER A CHANGE OF VENUE, IN THE FACE OF OVERWHELMING PREJUDICIAL PRETRIAL PUBLICITY, DENIED PETITIONER A FAIR AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Even after the limited and inadequate presentation of evidence in suport of the motion for a change of venue was presented to the Muscogee County Superior Court, that court observed that "this is one that should not be tried in Muscogee County." Tr. of September 30 venue hearing at 34. Had the facts been effectively presented, it would have been clear that petitioner's trial was nothing more than a hollow formality which took place after he had been convicted in the press in a climate of fear and frustration in a community beseiged by an extraordinary number of celebrated unsolved crimes. Thus, petitioner was tried in violation of his right to a fair trial by an impartial jury guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The record of petitioner's trial tells only a partial story of the unusually prejudicial pretrial publicity that occurred in Columbus between the time of the abduction of the decedent, a prominent piano teacher and director of the Methodist Church choir, and the trial of Mr. Brooks.

At the hearing on the habeas corpus petition, petitioner presented the testimony of Lawrence E. Noble, Jr. an associate professor of political science at Atlanta University and an expert in content analysis of media coverage of news events. Petitioner also proferred an affidavit of Dr. Nobel containing additional analysis of the pretrial publicity about which Dr. Nobel was prepared to testify. Careful analysis of the evidence petitioner has presented indicates that because of the pretrial publicity and the tensions in the

community, petitioner could not receive a fair trial in Muscogee County regardless of the voir dire procedures employed by the court.

The Columbus newspapers gave prominent coverage on their front pages to every development in the Brooks case. By the time of trial, the Columbus papers had put the case together against Mr. Brooks and convicted him.

The stories about the abduction of Ms. Galloway, the search for her, the reaction of her family and friends to her death and her funeral were given prominent and extensive coverage on the front pages.* Ms. Galloway was described as an honor student, a college graduate, a piano teacher, choir director, and someone who was liked by all who knew her. Pictures of her were featured in at least two front page articles. The papers reported in detail on the reaction of the congregation at her church to her death and on her funeral, which was attended by 500 persons.

From the outset the papers reported each development in the police investigation as the case against Mr. Brooks was put together. A map of the area where the body was found and comments of the police and coroner regarding the case were included in the first stories about Ms. Galloway's abduction. The identification of Mr. Brooks as the killer was the lead front-page story in the July 25, 1977, Columbus Ledger under a five-column headline. The next day the Ledger reported on its front page that Morris Comer had told police he had given Mr. Brooks a ride after Ms. Galloway was slain. "Witness Gave Ride to Suspect After Jeannine Galloway Was Slain," The Columbus Ledger, July 26, 1977, page A-1.

The papers also reported that Mr. Brooks' fingerprints were found on the victim's car in a front page story in which a "source" described the strength of the fingerprinting evidence as follows: "You need seven points of similarity to take it to court. . . They stopped counting at 35." "Fugitive Suspect's Fingerprints Found",

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*/ These articles were introduced as petitioner's exhibit 4 at the habeas corpus hearing. See, e. g., "Abducted Women I Still Missing." The Saturday Enquirer and Ledger, July 16, 1977, at A-1; "Abducted Girl Found Slain Near Her Columbus Home," The Sunday Ledger-Enquirer, July 17, 1977 at A-1; "Police Hunt Girl's Killer," The Columbus Enquirer, July 18, 1977 at A-1; "Congregation Weeps forits Slain Young Choir Director," "The Columbus Ledger, July 18, 1977 at A-1; "Silence, Confusion Pervade Choir Director's Funeral," The Columbus Enquirer, July 19, 1977 at B-1; "500 Attended Jeannie Galloway's Funeral," The Columbus Ledger, July 10, 1977 at B-1.

The Columbus Ledger, July 28, 1977, at A-1. Stories the next day in the two papers reported that Mr. Brooks had fled to Atlanta and had been indicted for rape and armed robbery by a grand jury in Fulton County. "Informants Say Killer Fled North," The Columbus Ledger, July 29, 1977, "Galloway Suspect Indicted in Fulton," The Columbus Ledger, July 29, 1977, at A-1.

Coverage continued in August with the arrest of the petitioner, his return from Atlanta to Columbus and pretrial proceedings. Petitioner's confession was the lead story on the front page of the Sunday paper on August 14. "Detective Testifies Brooks Admitted Killing Woman," Sunday Ledger-Enquirer, August 14, 1977 at A-1. It is apparent from the trial judge's comments at trial that other media also gave prominent coverage to the confession.

In the articles included in petitioner's exhibit 4, the Columbus papers picture Mr. Brooks as an extremely dangerous criminal who had fled to Atlanta armed with at least two guns. It was reported that he would not surrender without a fight and had vowed to kill a policeman. It was reported that Mr. Brooks has served time for robbery, was a suspect in the Atlanta lovers' lane killings, was wanted for rape and armed robbery in Atlanta and would have committed murder in that incident if he had not been interrupted, and that he had shot and paralyzed a Columbus cab driver with the same weapon with which he killed Ms. Galloway.

It is difficult to imagine how pretrial publicity could be any more extensive or any more prejudicial to a criminal defendant than that surrounding the Galloway slaying and the police investigation and other proceedings leading to Mr. Brooks' trial. But, in addition to the pretrial publicity surrounding his case, petitioner was prejudiced by the community's reaction to an extraordinary series of murders which had created a climate of hysteria in the community by the time of petitioner's trial. Even before the first of the celebrated murders of prominent Columbus women by the "Silk Stocking Strangler", the community appeared to be under seige due to a bizzare series of murders. On August 23, 1977, The Columbus Enquirer carried a story, included in petitioner's exhibit 4, listing 24 non-domestic

murders which had occurred in the preceeding 20 months.

The situation went from bad to worse in the two months immediately before petitioner's trial with publicity regarding the killing and sexual abuse of four prominent older white residents of Columbus by the "Silk Stocking Strangler." In his affidavit, Dr. Nobel traced the publicity surrounding the killings and the increasing sense of panic and fear in the community. A front page box on September 27 stated: "The recent killings have thrown thousands of Columbusites - especially women - into a state of nagging, unknowing fear." A story inside was headed "Nagging Fear Sweeps City," and the lead editorial was titled "Fear not Panic." Affidavit of Lawrence E. Nobel at 13. Letters to the editor advocating lynchings, public hangings, martial law, the death penalty and other measures to deal with the problem and other articles about community attitutes are described in the affidavit of Dr. Nobel at 11-14.

Claims founded on prejudicial pretrial publicity must be assessed in accordance with the due process standards established in Irvin v. Dowd, 366 U.S. 717 (1961), a habeas corpus proceeding in which this Court vacated a conviction and sentence of death because of pretrial publicity and community attitudes remarkably similar to those presented here.

In Irvin, the Court found the "then current community pattern of thought as indicated by the popular news media" to establish a clear and convincing "build-up of prejudice." Id at 725. The Court found that a barrage of newspaper headlines, articles and pictures revealed details of the background of Irvin, including references to his criminal record and alleged participation in other crimes, and announced that he had been placed at the scene of the crime, had confessed and had been indicated.

This court's decision in "Rideau v. Louisiana, 373 U.S. 723 (1963), is also instructive. There, a tape of the defendant confessing to the crime was televised three times prior to his trial. The Court concluded that after such prejudicial pretial publicity the subsequent court proceedings were nothing but "a hollow formality."

Id. at 726.

Applying the principles set out in Irving and Rideau to the facts of this case, it is clear that petitioner was denied due process of law by the failure of the trial court to grant a change of venue. The jurors chosen to try this sensitive case involving a black man accused of the rape and murder of a prominent white woman came from a community which had been saturated by sensational coverage of this and other murder cases. The nature of the prejudicial publicity and its extent is almost identical to that in Irving and more extensive than that in Rideau. And the vior dire employed at petitioner's trial was completely inadequate to cure the nature and extent of media coverage in this case.

Potential jurors were not even asked about much of the prejudicial publicity that has been discussed in this memorandum. What information was elicted in voir dire only confirms that there was extroardinary knowledge among people in the community about the facts of the case from the pretrial publicity. Because of the nature of the pretrial publicity in this case, one must conclude here, as did this Court in Irving and Rideau, that conclusory statements of impartiality by the prospective jurors must be given "little weight," */ and that the due process clause required that petitioner be tried in an atmosphere undisturbed by such extensive, sensational and highly prejudicial pretrial publicity. This case, as the trial judge stated at the venue hearing, was one that should not have been tried in Miscogee County. Tr. of September 30 at 34. Because it was tried there, petitioner's Sixth and Fourteenth Amendments rights were infringed.

Because the holdings of the Georgia courts in this case conflict with applicable decisions of this Court and further because petitioner's life is at stake, this Court should grant review of the peition.

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*/ Irving v. Dowd, supra at 728.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE PRONOUNCED AND PRESISTENT MISCONDUCT IN THE PROSECUTOR'S CLOSING ARGUMENT DURING THE SENTENCING PHASE VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Review of the closing argument given by the prosecutor in the penalty stage of petitioner's trial indicates that the Georgia courts allow practices routinely condemned in other jurisdictions. Because of the important constitutional considerations present in a death penalty case, this Court should review the decision below and decide whether the argument presented here was below the minimal standards required by the Eighth and Fourteenth Amendments in capital trials.

The closing argument given by the prosecutor at the sentencing phase of petitioner's trial was a catalogue of virtually every improper, irrelevant, inflammatory and prejudicial argument which can be made in a criminal trial.*/ It contained "a host of infirmities calculated to arouse passion and prejudice" that are more than sufficient to justify a writ of habeas corpus even in a non-capital case. See Alim v. Smith, 474 F. Supp. 54, 60 (W.D.N.Y. 1979). Under the due process clause of the Fourteenth Amendment alone, habeas corpus relief is required when a prosecutor has engaged in "pronounced and presistent misconduct" during closing argument. Brown v. Estelle, 468 F. Supp. 42, 49 (N.D. Tex. 1978) a Aff'd 591 F.2d 1207 (5th Cir. 1979); See also: Houston v. Estelle, 569 F.2d 372, 385 (5th Cir. 1978). The closing argument in this case cannot satisfy any due process standards or the more rigorous Eighth Amendment requirements set forth in Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion), because it consists almost entirely of a series of arguments that have been recognized as being so prejudicial that each alone requires that petitioner's sentence be vacated.

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*/ Petitioner has summarized and quoted some of the more flagrant examples of improper and prejudicial argument in his habeas corpus petition at paragraphs 48-50, pp. 24-31. The argument appears in the trial transcript at pages 859-73. See Appendix at 42.

the death penalty as one of the possible penalties, and would you vote for it if the facts and circumstances of this case authorized it, or warranted it. Of course, you didn't know what the facts and circumstances were at that time. But, each one of you said you would. And, we're asking you again to go back to the jury room and to deliberate, and to talk about the facts and circumstances of this case. Talk about how at eight-thirty in the morning she went out to the edge of the yard in broad open daylight, and how he was just walking along with a pistol in his pocket, and decided, "Well, I'll make a hustle," to use their language, his language. And then after he did that, "Well, I'll rape her," so he carried her down in the woods, and raped her, and shot her, and left her there bleeding to death. Those are the facts and circumstances we were talking about Tuesday, when we asked you if, under certain circumstances, you would vote for the death penalty.

I believe you'll vote for the death penalty. I want you to go out and discuss it, take all the time that you need, and we ask you to bring back a verdict on the punishment phase, and that he be put to death in the electric chair.

THE COURT: Mr. Sanders.

going to save society and save civilization, then we've got to remove them from society.

And, you know, it's one thing that people who oppose capital punishment they can't dispute, if he's put to death, he'll never commit another crime, he'll never kill anybody else, never rape anybody else.

Now, we ask you, and you'll have written instructions going out with you, and in order to impose the death penalty, you must first find that while the murder was committed that he was engaged in certain other crimes, one is kidnapping, certainly he was engaged in that when he committed the murder, he carried her away from her home against her will. You recall that she had an appointment to eat breakfast; she had no idea she would be going anywhere other than to Shoney's.

The other thing is, he robbed her, committed an armed robbery, if you find that he committed the murder while he was engaged in either one or both of these two crimes that I've mentioned, the kidnapping or armed robbery, then you are authorized to impose the death penalty. And, let me talk to you about that a minute. Tuesday when we were examining you as prospective jurors, I asked each one of you the question, "Are you conscientiously opposed to the death penalty?" And every one of you on this jury said no, that you were not. I went one step further, and I asked you if you would consider

to do something about it." Well, you have an opportunity to do something about it right now. The police have investigated the case, we've prosecuted it the best we know how, and you're in the position of Harry Truman, who had on his desk a sign that said, "The buck stops here." The buck stops with you today. And you can do something about it. You can bring back the death penalty and you can tell William Brooks, and you can tell every other criminal like him, that if you come to Columbus and Muscogee County, and you commit a crime, and it's one of those crimes that's punishable by death, and if the aggravating circumstances are there, you're going to get the electric chair, that's what you can do. And, I believe that will stop some of the crime.

Now, I know it's going to be a hard decision, it's not easy, it's never easy. You can think about it this way when you get back there, you know from time to time if you were a surgeon, and you have people coming to you and maybe they have a cancer on their arm, and you look at it, and you say, "Well, the only way to save your life is to take your arm off," and that's bad to have to remove someone's arm. Or maybe he's got cancer of the eye, you have to take his eye out. Sure, that's terrible, but it's done because you save the rest of the body. And, I submit to you that William Brooks is a cancer on the body of society, and if we're

this country, except it's not a foreign nation, it's against the criminal element in this country, that's who we are at war with, and they're winning the war, is what's so bad, and if you don't believe they're winning, just look about you. You don't dare get out on the streets at night and walk around, you don't dare leave your house unlocked. In fact, most everybody I know has added more locks to their house, and burglar bars, and burglar alarms. And, we've got a man here in town who makes a living with guard dogs. And, if you go to the hospital to see some of your friends, you've got to get by a security place up there, and you see security guards everywhere. Why are they there? Because of the criminal element in this country. It's winning.

And, if we can send a 17-year-old young man overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case against William Brooks, and I submit to you that he's an enemy, and he's a member of the criminal element, and he's our enemy, and he's an enemy of the law-abiding citizens and the people who want to live peacefully in this country, and who want to be secure in their persons and their homes.

You know, lot of times you see people on the street, and they are always stopping us and saying, "You know, something's got to be done about this crime wave, what can we do, Mr. Whisnant; what can we do, Mr. Smith, we've got

now, that a man escaped from a prison in Tennessee that no one had ever escaped from before. So, you've always got the possibility that he might escape and be out on the streets, and who knows who it will be next time, whose daughter will it be next time? It was Mrs. Galloway's daughter this time, Bobby Murray's girl friend; whose girl friend or daughter will it be next time if he's out?

And this is -- I'm going to say this, and maybe you don't agree with me, and I'm sure I'll be accused of being materialistic in saying it, but why should -- if he's given life, it costs money to keep him, thousands of dollars a year to keep a prisoner housed, fed and clothed, and medical care, why should the taxpayers, and that's you folks, all of us, why should the taxpayers have to keep up somebody like William Brooks the rest of his life, when he's done what he's done? Why should we?

Let me say this to you, during my lifetime this country has been in three wars, each war we've taken our young men down to the age of seventeen, we've trained them, we've put guns in their hands, we've taught them how to kill the enemy and we've sent them overseas, and they have killed other human beings who were enemies of our country, and when they did a good job of killing them, we decorated them and gave them citations, praised them for it.

Well, I say to you that we're in a war again in

All right, I'm sure that the defense is going to make this argument to you, we don't have to take his life, you don't have to take his life, just lock him up, put him away somewhere where he'll never be in society again, where he'll never harm anybody again, that's punishment enough, spare his life, just put him away forever. Let's think about that. Going back to what I said a while ago, the first thing is you've got to give appropriate punishment to fit the crime, and letting him live is not appropriate for the crimes that he committed, that's the first thing. And the next thing is, he has demonstrated that he's a killer. Anybody who can kill a poor defenseless person, or murder a poor defenseless person like he did will kill again. He doesn't care, life doesn't mean anything to him. So, you put him in prison. How about those guards that have to guard him? They have families depending on them, how do you know he won't kill one of them?

And, even worse than that, how about some young prisoner, or some other prisoner who is in prison with him, who is there trying to make his time, trying to be rehabilitated so he can go back to his family, back to society? He could kill him, kill a fellow prisoner.

How about if he escapes? And, I'm sure they're going to say, "Oh, he couldn't escape." But, it was the early part of this year, or late last year, I don't recall

penalty, he believes in executing people. He carried Carol Jeannine Galloway down in those woods out of sight of everybody. Carol Jeannine Galloway didn't have a battery of lawyers around her, she didn't have a judge sitting there ruling on evidence, she didn't get twenty strikes when the jury was selected, she didn't have any Courtroom with cameras so that the whole world could see that she got a fair trial. He just stepped back at point-blank range within three feet of her and killed her, shot her. So, he believes in the death penalty, he executed her, a lot more horrible than the electric chair which is a quick thing, brings death on real quickly. She lay there perhaps an hour and a half or two hours before she bled to death.

And then, somebody is going to say, "Can we sympathize, what about sympathy, can't we be sympathetic toward him?" The only answer to that is show him the same type of sympathy that he showed Carol Jeannine Galloway, the same sympathy that he showed her, left her laying there, after he had robbed her, taken her car, and satisfied his lust, he still killed her. Not one spark of sympathy, not one bit of sympathy did he show for her. His only thought then was to get away, and he did get away. He got his shoes muddy, and went and bought him some new shoes with the money he took off her. No remorse at all. So, he has no sympathy due him, and we ask you not to show him any.

investigated this case and who apprehended William Brooks, they're not taking his life; the Recorder's Court Judge who heard the evidence in the preliminary hearing, are you going to say he's responsible for taking his life? Of course not. How about the Grand Jury who listened to the evidence and indicted him for murder; are the Grand Jurors responsible for his life, can you say they're about to take his life? Of course not. How about me and my staff, we put the case together and we prosecuted him, and we're here now asking you to bring back the death penalty, do we feel responsible? I don't. I don't think anybody in my office does.

How about the man, if he's electrocuted, who actually pulls the switch, is he responsible for taking his life? Of course not. The person who is responsible for his life is William Brooks himself, and if the switch is pulled and he's put to death, he pulled the switch the morning that he was walking along Saint Mary's Road when he put the gun in the back of Carol Jeannine Galloway and kidnapped her, that's when he took his own life. He's a grown man, and he knew what he was doing.

Now, I'm sure that argument is going to be made, either by Mr. Araguel, or maybe some member of the jury that, "Well, the death penalty is bad, maybe we can do something else." Well, let me say this to you; I told you I believe in it. William Brooks believes in the death

like that. Our society and our law was never designed to accept anything like that, and it's ridiculous, and I don't believe that you'll accept it, I don't believe that you'll buy it.

Now, I'm sure they're going to say, "He's a young person, just twenty-two years old, let him live." Well, he's no child, he's not fifteen, he's a grown man. Now, you can vote when you're eighteen years old, you can go in and buy a beer when you're eighteen years old, you can serve on the juries, have property in your name when you're eighteen. He's four years beyond that, he's a grown, mature man.

And, another thing, he is young, and if you look around and I'm sure you have, that's the group that's committing crimes in this country, are the young people, and if you don't punish young people, then you're not punishing the people who are committing the crimes. He's a mature man, and he doesn't deserve any credit or any sympathy from you just because he's twenty-two years old.

Now, I'm sure another question that might be going through your mind at this time is, when I get back to that jury room, and we have to vote, and I vote to take somebody's life, can I do it? I know it's rough, it would be hard for me to do. Can I take somebody's life? Well, the truth of the matter is, you're not taking his life, you're not pulling the switch in the electric chair; the police who

for the death penalty, and I'm sure you're going to hear this from the defense, is rehabilitation. Is there any chance that the defendant might be rehabilitated? And we thought about that in this case. And, I submit to you that there's no chance that William Anthony Brooks will ever be rehabilitated. Let's look at what he did. He's been in trouble since he was a child. His own sisters told you that he was a car thief when he was a young child. And, they talked to you about him being beaten by his stepfather, but they never did say what his stepfather was beating him for, maybe he needed it. There's nothing wrong with whipping a child, some of them you have to whip harder than others. And there's been children who have been abused and beaten, but they don't turn to a life of crime on account of it. Goodness sakes, I got whippings when I was a child, I thought my daddy used to beat me, and he did, but that doesn't give me an excuse to go out and commit a crime. The fact that he got a beating when he was ten or eleven years old, does that give him the right to stop at somebody's house and put a gun in their back, and drive them down to the woods, strip them and rape them, and then after his lust is satisfied, murder them? That's what they want you to buy, that's what they want you to accept. Just because he got some severe whippings when he was a child, that you ought to forgive him for that, or that he ought to have a right to do something

rapes her, and then after he's satisfied his lust, what does he do; he turns around and shoots her down like you would a dog, a stray dog. And, he didn't kill her then, he said she was screaming and he shot her, and she fell, and was still trying to scream, so he said in his statement, but the sound wouldn't come out, and she bled to death, very slowly, drip by drip, drop by drop. I pray that she was unconscious. That's the kind of condition he left that lady in. You wouldn't do that, as I said, to a stray animal that you wanted to get rid of, you wouldn't treat it like that. But, that's what William Brooks did to Carol Jeannine Galloway. If you sat down and tried to think up a horrible crime, could you think of anything more horrible than what you've heard here this week, that this defendant committed on this young lady? Could you think of anything more horrible?

All right, and another thing that we consider before we come to you and ask for the death penalty is the proof in the case, not that we just prove him guilty beyond a reasonable doubt and you find him guilty, but I mean, overwhelming proof, and you have that in this case. You've already found him guilty, and I'm sure you agree with what I said this morning that the evidence in this case against William Brooks is overwhelming, he did it, there's no question about it, and it was a horrible crime.

And, another thing that we consider before we ask

Now, we don't ask for the death penalty -- I've been District Attorney for seven and a half years, and we don't take this business of asking for the death penalty lightly. We don't come up here on every murder case that we try and say, "Give the man the electric chair." In the seven and a half years I've been District Attorney, I believe we've only asked for it less than a dozen times, I think it's nearer eight or nine, but I know it's less than twelve. So, we take it seriously. We ask you to take it seriously. It is a serious matter.

Now, what do we consider before we come to you and ask you to impose the death penalty? Well, one of the things that we consider are the facts of the case that's being tried. Was it a horrible crime that was committed? And let's stop there and look at the facts of this case, and look at what type of crime this was. Here was Carol Jeannine Galloway on a summer Friday morning, getting ready to go have breakfast with her friend, she sees a garbage can outside there and decides, "Well, I'll pick it up and put it up for my mother so she won't have to do it, or my father," whoever was going to pick it up. And, along comes William Anthony Brooks, probably never seen her before and didn't know her, but he had that pistol in his pocket, he puts it on her, makes her get into the car, drives her out there, takes her down into the woods, makes her take her clothes off,

surrounded by his lawyers, and you've seen him. Let's talk a minute about the person who is not here, about Carol Jeannine Galloway. What kind of person was she? We know that she was a pretty young lady, a beautiful young lady. We know that she was about twenty-three years old, she was not married, that she still lived with her mother and father, and we know that she was a person of high morals. We know that she was a considerate person. She went out picking up the garbage can to save her mother or father from having to do that. We know that she was a thoughtful person, she was going to treat her friend to breakfast before her friend left town.

So, when Mr. Araguel, or Mr. Sanders, whoever makes the argument on that side, starts talking about William Brooks' life, and about William Brooks, about what a young person he is, his family, think about the Galloway family. And think about Carol Jeannine Galloway, who is not here in the Courtroom today, and who will never be here again.

Now, they're going to tell you, don't take William Brooks' life, locking him up is enough, don't put death on him, don't make his family go through with that. What has the Galloway family gone through, what have they gone through? Next week when it's Thanksgiving, and they are sitting around the table, Carol Jeannine won't be there, and never will be there again.

kind of punishment fits that crime, whether he gets life imprisonment, or death in the electric chair. And, we say in these circumstances that the only appropriate punishment is death in the electric chair. We're going to have some more to say about that before I sit down.

Now, I know you've heard discussions about the death penalty, you were asked numerous questions about it last Tuesday when we were trying to select a jury and you were prospective jurors. Let me tell you here at the outset that I am for capital punishment. If you've got to take sides, I take the side of capital punishment. I believe in the death penalty. I think it's necessary. And some people, I'm sure Mr. Araguel is going to tell you that there is no proof that the death penalty deters crime, you can't prove it. But, I can tell you this; the last person in Georgia was electrocuted in 1964, and since that date, crime has increased year by year, time after time, everytime the statistics come out, we have an increase in crime rate. We didn't have that when we had capital punishment. We didn't have this kind of murder, these kind of crimes you've heard about here this week, when we had capital punishment, if they were they were very seldom, we heard about them somewhere else, but not around here.

Now, let's think about this, you have looked at William Anthony Brooks all week, he's been here and been

CLOSING ARGUMENT OF THE PROSECUTION DURING
THE PENALTY PHASE OF PETITIONER'S TRIAL

MR. WHISNANT: May it please the Court, and you, ladies and gentlemen of the jury, I thank you again for your patience, and this is the last stage of the trial, this is the last time you'll have to hear me or Mr. Araguel talk to you. I know that you're tired of hearing us. But, this is an important part of the trial, just as important as the guilt or innocence stage of the trial, and we ask you to treat it as just as important as the first phase of the trial.

By your verdict, or at noon today, you have found this defendant guilty of murder, kidnapping, armed robbery and rape, and we're at the stage of the trial now where we fix his punishment, you fix his punishment, on the murder charge.

Punishment has a two-fold purpose, one purpose is to punish the guilty offender; the other purpose is to deter others of a like mind committing the same type of crime. In other words, if somebody else is thinking about murder, if you punish this man it's supposed to deter the other person from committing it. So that's the two-fold purpose of punishment.

Now, let me talk about the first phase of it, to punish the guilty. Punishment is supposed to be adequate and appropriate. In other words, the punishment is supposed to fit the crime, and the crime in this case is murder. He took the life of a person. So, you've got to decide what

trial. Two days before that trial in the Sunday paper, there was a boxed letter that a Columbus bank president had written to Governor George Busbee urging the Governor not to allow the Board of Pardons and Paroles to have the opportunity to commute any death sentences.

This long catalog of newspaper material that appeared in the Columbus papers in the pretrial period about community fear, the need for the death penalty, set as the period was in the midst of a shocking series of fatal attacks on white women alleged done by a black person, gives some indication four years later of what the prospective jurors were living through just before they were called to sit on the Brooks jury. With such newspaper coverage, there is little doubt about how inflammatory the electronic coverage was in the same period.

25) The amount and nature of the newspaper publicity, along with what we know about electronic media and their handling of such news, makes it clear to me that prospective jurors exposed to such publicity in the venue would strongly have tended to form prejudgments about the case from exposure to the publicity. Those prejudgments would most likely have been very negative to the interests of the defendant and would have made it unlikely that the defendant could effectively be presumed to be innocent until proved guilty by the state beyond a reasonable doubt. In such a venue where the jury pool has been contaminated by publicity likely to cause prejud-- ment, which publicity was primarily originated by government sources, and where authoritative figures in the community such as editorial writers, preachers and bankers were publicly calling in general for the use of the death penalty, where the life of the defendant was on the line, it is clear to me that in the interest of giving the defendant the fairest trial possible, the venue should have been changed.

Lawrence E. Noble Jr.
LAWRENCE E. NOBLE, JR.

Sworn to and subscribed before me
this 11th day of November, 1981.

Carrie W. Bell
Notary Public

On September 27 The Enquirer had a front page story about rewards in The Strangler cases, and a second story headed "Fear Stalks Neighbors." On page B-1 there was an 80 column inch feature story headed "Recent Crime Wave Sparks Interest In Rape."

On the same day, September 27, The Ledger ran a front page box: "The recent killings have thrown thousands of Columbusites - especially women - into a state of nagging, unknowing fear. For the story, see B-3." The B-3 story was headed "Nagging Fear Sweeps City," and was a 45 inch piece about the two recent sex killings, not then called Strangler in the press. The lead editorial that day, titled "Fear Not Panic" urged concern. A letter to the editor was headed "Women, Demand More Protection."

The next day a letter complained of the reporting techniques of the lead crime reporter, who it was claimed used inflammatory language. The Galloway death reporting was used as an example.

The television murder trial in Miami was also being reported on during this period, and the decision to televise the present trial naturally aroused curiosity and interest in the community that might not be present in any trial that was not televised. A decision to televise focuses the attention of citizens in the pretrial period.

In early October the Patrick trial was held and he was convicted and sentenced to death. During this period two women soldiers were found killed at Fort Benning.

When a story about the third Strangler killing was reported, a story headed "City Has the Jitters" appeared on The Ledger front page, October 24.

On October 26 The Enquirer reported the fourth Strangler killing and on the same front page ran a story entitled "Stunned Friends Tremble in Rain."

The next day The Ledger had an editorial urging the city not to celebrate Halloween, and there was a letter to the editor calling for marial law. There were three letters to the editor the following day, headed Respectively: "Fear Can Destroy Us," "Don't Spend Money on Dogs," "Pray Killer Out of Hiding."

On October 30 the Ledger ran a long editorial answering the many suggestions about what the city should do about the crisis. One suggestion had been to use troops. Letter writers began to criticize the police department, other letters answered with defenses of the police department. On November 9 a Ledger letter appeared headed "Death Penalty is Advocated." This was five days before the start of the Brooks

On July 20 and July 21 two other Ledger editorials, referred to above in paragraph #21, called for citizen involvement in assisting police, one of them again mentioning the Galloway death. An August 1 editorial praised the police chief upon his election as President of Georgia Chiefs of Police.

On August 17 The Enquirer ran a letter to the editor saying the death penalty is biblical, and that God had "demanded" the death penalty.

The next day The Ledger ran a W. F. Buckley column "Opinion Favoring Death Penalty," which was the day after the indictment of Brooks was reported.

An August 19 letter in the Enquirer titled "Reader Wants Public Hangings" referred to the Galloway death and opined that the lack of the death penalty "breeds" criminals.

On August 22 a front page story in The Ledger headed "Slayings Create Climate of Fear," about assaults on five women in ten months (another assault of a woman reported in the same page), included two paragraphs on the Galloway death, and stated: "This carnage against women which started last summer has prompted fear in many Columbus women, especially young women, and especially single women."

The Gates case was reported in August-September. Gates was sentenced to die, a black youth convicted of raping and murdering the white wife of a soldier.

The Ledger of August 31 carried a lead letter headed "Minister Supports Death Penalty," by a local Presbyterian parson. He praised the Buckley column on the death penalty, extensively quoted the Bible, and assured readers that the word of God supports the death penalty.

On September 2 The Enquirer ran a front page lengthy story, featuring a large photograph of the electric chair, about death sentences in four cases, Gates, Griggs in Thomaston, Drake in Danielsville, and a case in Birmingham.

On September 2 and 3 the papers reported the resignation as public defender by defendant's counsel, who later reported that he had a lot of pressure put on him by his friends after he took on Brooks as a client. This community pressure obviously contributed to Brooks' loss of counsel at a critical juncture, and reflected emphatically the hostility inthe community against the defendant.

On September 6 The Ledger ran a letter entitled "Hangings Are Urged."

On September 16 The Enquirer had a letter entitled "Shall We Try Lynching?", since other approaches are not effective.

The Ledger had an editorial on September 20 entitled "Senseless Loss," on what was the first Strangler murder.

23) Most of the publicity was generated by the government. This was true of all of the material except the pieces about the victim's funeral and family, and the article about the reaction of Brooks' family. And in each of those articles there was government-generated material. The most damaging single government-generated story was the report of the so-called confession statement from the pretrial hearing. The prosecution and the court in that hearing, allowing as they did such material to be made public, were in effect deliberately contaminating the prospective jurors against the defendant. The material on Brooks' alleged criminal record, his alleged connection with numerious capital crimes in Fulton County, the reports of witnesses in Columbus identifying him as the killer of Miss Golloway, the finding of his fingerprint on Miss Galloway's car, topped off by his alleged confession, all of this coming from government sources, convicted Brooks in the media, effectively obviating the necessity for a trial. This use by the government of willing media to convict the defendant de facto before the formal trial put a very heavy burden on the prospective jurors if they were to come to the trial as they should as being neutral and impartial.

24) From July to November, 1977, Columbus newspapers told the story of violent crime in Muscogee County, and in the nation also. The Son of Sam case in New York was featured during that period. John Spenkelink in Florida was appealing his death sentence and this was played up by the Columbus papers. Columbus had endured a series of murders and other killings over an extended period of time. The Gates case was tried, the Patrick case was tried. Then the so-called Stocking Strangler killings began in September. Four of those had occurred before the trial of Georgia v. Brooks. The media was asking for citizen involvement to solve crimes, for the death penalty, for the community to be concerned but not panicky. This evolving climate of alarm in the venue over the weeks and months before the Brooks trial is reflected in the two newspapers. The following material was noted while doing a search for other articles on the Brooks case which might not have been included in the material furnished by counsel. Most of the material came from the Ledger.

On July 19 The Ledger carried an editorial "On Believing Crime Views" which mentioned the Galloway death: "an attractive and popular young woman in Columbus is abducted from her home, then her assailant ends her life with a gun in a wooded area." The editorial called for "a hard stance in handing out sentences to make them fit the crime."

Brooks did not utter a word during the hearing. ... his attorney for the preliminary hearing entered a plea of innocent for the defendant.

The burly defendant, whose brother was a former policeman, stood with his hands cuffed in front of him. Brooks was flanked by Sgt. L.A. Jacks and Warren Myles, two of the largest officers in the department.

Detective Frank Simon testified fingerprints were taken from the Galloway car which matched Brooks' prints.

Brooks' statement began by saying he was going to a friend's house to work on a car and was dropped off by his sister on St. Mary's Road. He said he began walking down the road and "saw a white girl in her yeard."

"She was picking up a trashcan and I walked up behind her. ... she saw me and she was scared. I asked her if anyone else was home, and she said her mother and father," the statement said.

Brooks' statement said that a woman came out of the house and called the younger woman by name, although he forgot what her name was and that the woman he had accosted told the other woman to go back into the house.

"I pushed her out of the utility room and told her to drive down Dawson Road (now called North Star Drive.) ... I told her to drive down a dirt road behind the school," the statement says.

"She was continually asking me to let her go - to take her money and the car and let her go," the statement says.

The statement said that Brooks took the woman into the woods. "I told her to take her clothes off. She said no, and I yelled at her to take them off."

Brooks said the woman took all her clothes off and he told her to lie on the ground where he raped her. The statement says Brooks then told her to get dressed which she did. He then asked her if that "was the first time she had sex," the statement says.

"She said yes, and I said I didn't believe it. She started screaming and wouldn't stop and I pulled out my gun so she'd know I was serious ... she kept screaming and the pistol went off," Brooks reportedly said.

"She kept trying to scream but she couldn't get (or hear) her voice," the detective quoted Lynn (sic) as saying.

The statement then says Brooks asked three people to use a phone and that he hitched a ride to South Dixon Drive, Brooks' statement said he told a friend of his that he knew police were looking for him for Miss Galloway's killing but that he didn't do it, so the friend took him to Atlanta.

Brroks' statement says he and his brother sold the .357 Magnum used to kill the woman to two men on a used car lot in Phenix City, that he had obtained the gun in a burglary, and that he had used it to shoot a cab driver on Cusseta Road.

There is little doubt that such a presentation in the media, and referred to in several other later reports, one saying the Brooks stood by "passively" as the statement was presented at the hearing, contaminated the jury pool to an absolute extent. The cap stone of the prejudicial publicity was this statement of alleged confession.

One small clue may be all that is needed to collar the killer.

The next day in an editorial entitled "Getting Involved," The Ledger urged citizens to help police in the current anti-pornography and anti-prostitution drive in Columbus. In the public mind such issues are related to the crime of rape, however erroneously. These urgent calls for citizens, which includes prospective jurors, to become involved in crime detection, generally, and in particular in the present case, coming as they did from editorial writers, authoritative voices in a community, are extremely significant. Such calls enlist citizens on the side of the police, of the prosecution, and in effect ask prospective jurors to become a part of the police and prosecution team. Especially in sensational cases such as the present one, it is extremely difficult if not impossible for prospective jurors who are persuaded by such calls to later shift to the position of impartiality and neutrality which are demended by the canons of due process.

23) Perhaps the most damaging theme of the publicity for the defendant was the report of a pretrial hearing. In a page one story in the Ledger of August 14, headlined "Detective Testifies Brooks Admitted Killing Woman," it was reported that the defendant freely confessed. This was before the indictment, and it was later reported that the alleged confession was read to the grand jury. Because this story is so compromising to the defendant's receiving a fair trial in the venue, it is quoted here in full:

> William Anthony "Fats" Brooks told Columbus police officers he raped and killed Carol Jeannine Galloway, a detective testified Saturday at Brooks' preliminary hearing.
>
> Detective Ronald Lynn testified in Recorders' Court that Brooks said: "All right. I did it. Y'all put it (the case) together. I did it.
>
> Lynn read into the record a written statement which he said Brooks signed which gave a detailed account of the July 15 rape and killing.
>
> Columbus Recorder Edward Murrah ordered Brooks, 22, jailed without bond to await grand jury action.
>
> Dist. Atty. Mullins Whisnant said the car theft, kidnapping, rape and murder charges against Brooks will be presented to a grand jury Tuesday. Whisnant, who reiterated he intends to ask for the death penalty, estimated Brooks would be tried within 60 days.
>
> Police said prosecutors will also seek indictments against Brooks for armed robbery, aggravated assault, and car theft in connection with the shooting and paralyzing of a Columbus cab driver two months ago.
>
> Everyone entering the courtroom for the hearing was frisked by hand and checked with a metal detector. Brooks' father, whom those near him said head been drinking, was escorted out of the courtroom by officers.

Brooks, you're gonna fry,' came the calls from prisoners already inside the jail." This is blatantly crude and prejudicial journalism. In the same story the district attorney confirmed that he would seek the death penalty for the defendant.

Hence Brooks is reported factually as having a record, factually as having killed Miss Galloway and factually as having raped and robbed a woman in Atlanta. None of the usual precautionary media language is used. Brooks is simply labeled as positively to have done these deeds. This type of journalism is heavily prejudicial and pictures the defendant as clearly and definitely a criminal and positively the killer of Miss Galloway.

20) The theme of the police efforts in the case was emphasized in most of the material. Police went door to door at 3000 houses in Columbus. Working with police were military police, military helicopters, dogs, Boy Scouts. When the suspect was identified the police search spread nationwide. Columbus police went to the Baltimore area to get information. They went to Atlanta, Atlanta area police joined the search. The FBI was called in to assist. In the early stages of the search in Columbus almost the entire police force was assigned to the case. Obviously any person subject to such a hunt would appear to the media users as described, dangerous, an assumed killer, a man with a criminal record who had served time, who had raped, and robbed recently in Atlanta. This theme was clearly prejudicial to the interests of the defendant.

21) The theme of community involvement is a critical one. Prospective jurors are part of the community. Police were reported as "begging" for assistance from the community in searching for and identifying the criminal. Two editorials in the newspaper called for citizen involvement. One, entitled "Police Hot Line," urged such a system and asked citizens to call in with information about crime. The present case was mentioned as an example. The editorial stated that almost every time there is a serious crime in Columbus "an undercurrent of fear and anguish settles over the community." (Ledger, July 20) The same day the Enquirer had an editorial entitled "Disturbing Quiet," in which the present case was detailed and in half of which citizens were asked to come forward and help police if they have information:

> But there must be someone, somewhere who could provide a key to the crime.
>
> If there is, a sense of public involvement, of human decency must prevail and that information provided to the police.

reporting even resulted in these stories having derogatory material about the defendant. The arraignment story, six inches in length, contained 30 derogatory references. The story about Brooks' family was headed "Murder Suspect's Family Is Bitter," was 20 inches and had 46 derogatory references.

19) The criminal record and other alleged criminal activites of the defendant were highlighted. Brooks was described as having served time in Maryland for armed robbery. He was reported as being indicted in Fulton County for rape and armed robbery. He was also reported as a suspect in a series of Atlanta murders called the Lovers Lane killings. He was also reported as a suspect in another shooting in Muscogee County. Authorities described him as being heavily armed and very dangerous. These detailed descriptions of the defendant as a known criminal appeared in ten of the newspaper pieces. In one piece the composite sketch of the suspect was described as "Sketch of Killer." A later story about Brooks was headlined "Informants Say Killer Fled North." He was labeled the killer even before he was arrested. In a story before the arrest, detail was given about Brooks' fingerprints being found on the victim's car. Two police experts compared the prints on the car with Brooks' prints. "The two men obtained prints which seemed to correspond with Brooks'. 'You need seven points of similarity to take it to count,' one source said, 'They stopped counting at 35.'" In a story headlined "Galloway Suspect Indicted in Fulton," located across the top of the front page, the following paragraph appeared:

> Columbus and Atlanta detectives believe Brooks may have fled to Baltimore where he knows people and where he was arrested and convicted or robbery with a deadly weapon in 1973. Brooks was sentenced to five years, but was released on September 15, 1976, records show.

There were numerous such references to the defendant's previous criminal record. An especially damaging story was headlined "Murder Suspect Also Sought In Atlanta Rape," and reported that a woman was robbed and raped "by a man fitting Brooks' description who repeatedly threatened to 'blow her head off,' police said." Five paragraphs later the story reports: "Detectives working on the case believe Brooks might have killed his victim if the two men had not arrived." Hence the story evolved into a statement that Brooks had done the deed, positively. The story concluded: "Brooks carries a .357-Magnum and a .45 caliber automatic handgun, police believe, and is considered extremely dangerous. One officer familiar with Brooks' habits, said he doubts whether the desperate suspect will give up without a fight." When Brooks was arrested and brought to the Columbus jail, the story featured the following: "'They got you,

Each one of these themes was analyzed and will be reported on below.

17) The victim in this case was a young woman of talent and promise who was very interested in the organized church. She was an honor student, a college graduate, and was very popular with her peers and elders. Naturally the publicity about such a person would be extensive, and it was. The victim was described as young, popular, piano teacher, choir director, slender, best friend, sweet, having a quick wit. Such descriptions evoke heavy sympathy in the readers. There were three long stories in the paper about the victim's funeral. The reporters went into great detail about the sermons given and the hymns sung, all very emotionally impressive among a church-going population. Another story was devoted to how the victim's family felt about the victim and about how the family was grateful to the community for the support given. Her friends were establishing a scholarship in her honor at the college. "She was frail and thin, she looked like a fawn running through the forest," stated her brother. The victim was also described as being a heroine by the police and by her family and friends, and by the media. Her actions upon the abduction to try to protect her mother from also becoming a victim were detailed many times, and were described as heroic.

The coverage of this these amounted to one-eighth of the material. Such detailed attention to the victim, and sympathetic treatment of the victim, is prejudicial to the interests of the defendant. Prospective jurors who receive such treatment of the victim by the media will quite normally form prejudgments about a person who would harm such a fine person with so much potential in the community.

18) Defendant Brooks was pictured in the media material as being a criminal type with a criminal record, who had served time. One policeman was quoted as saying Brooks had vowed to kill a policeman, and that he would fight to defend himself with arms when apprehended. Brooks allegedly has a tatoo on one arm "J.G." There was actually speculation in the press stories that the "J.G." might refer to Jeannine Galloway, the victim. Such inflammatory recklessness by the press is extremely prejudicial. In the newspaper material the defendant's name was used 161 times. This massive coverage assures name recognition among prospective jurors and associates the name with the person so heavily damaged in the news stories through prejudicial material. There were two stories that had some favorable material about the defendant. One story reported his plea of not guilty at the arraignment. The other story was a report of his family's reaction to his plight. The nature of news

Brooks Indicted in Rape, Slaying

Detective Testifies Brooks Admitted Killing Woman

Fourteen of these headlines appeared on the front pages, three appeared on the front pages of the second section of the papers, and one on page D-4.

15) For purposes of analysis I use a concept called the derogatory reference. A derogatory reference is any word or group of words in the publicity that puts the person in a bad light, that reflects negatively on the person's character or background, that associates the person with the crime, the search, the investigation or with any part of the criminal justice process. In the newspaper material there were 2,135 derogatory references to the defendant and his interests. This is an average of some three derogatory references per column inch, or about one derogatory reference every eleven words of each news story about this case. My research has also shown that the electronic media has a higher derogatory reference rate than the print media. Based on that research experience, and on the count in the newspapers, the rate with which the media reported this case against the interests of the defendant was very high. Examples of derogatory references in this case include these words: murder, slaying, rape, armed robbery, kidnapped, abducted, search, fugitive, dangerous, killer, suspect, fingerprints, charged, indicted, arrest, gun, shot, funeral, killing, forced, gunpoint, bled to death, confession, admitted, jail, prison, penitentiary, death penalty, crime, getaway, body, dead, warrant, homicide, shot in the throat. For instance, there were 221 uses of the word murder and its synonyms. Kidnapped or abducted and related words were used 111 times. Rape or rapist were used 62 times. Shot in the throat was used 19 times. The crime in this case was heinous and inflammatory, and the media used appropriate language to write about the case. Much of this was sound reporting. The point is not the accuracy of these emotion laded words. The point is that the use of these words would tend to cause prejudgment about the case in the minds of the prospective jurors. The high rate of use clearly had a tendency to reflect negatively on the defendant.

16) The material was examined on the basis of themes in the publicity. A theme is a prominent emphasis that is in the content. The major themes were:

Concern for the Victim
Background and Character of the Defendant
Criminal Record of the Defendant
Police Efforts in the Case
Community Involvement
Alleged Confession by the Defendant
Government-Generated publicity

for Muscogee County was 167,377, 54.4 percent of which were persons 18 to 64 years old, the ages of most prospective jurors. This was some 96,074 persons. Hence the newspapers were capable of reaching all of the prospective jurors in Muscogee County. The major part of the newspapers' circulation was in Muscogee County.

13) The 33 pieces of newspaper material covered 681 column inches. This included an estimated 24,120 words, the amount of words in a 60 page paperback book, or in an 80 page typed legal document. Also included were ten photographs, two of the victim, one of the crime scene, two of the composite sketch of the suspect, and five pictures of the defendant.

14) Newspaper headlines are simple messages that convey the main point of the news story to the readers. They are written in bold print, and research shows that many readers often read only the headlines of many stories. In addition, the electronic media are often referred to as headline media because of their lack of facility for in depth coverage. Headlines in newspapers also tend to emphasize the most sensational aspects of stories. Some headlines about the incidents in this case include:

Abducted Girl Found Slain Near Her Columbus Home

Congregation Weeps for Its Slain Young Choir Director

Silence, Confusion Pervade Choir Director's Funeral

500 Attend Jeannine Galloway Funeral

Family Touched by Community's Grief

Police Search Door to Door For Columbus Woman's Killer

Sketch Is Added To Hunt For Killer

Suspect Is Identified in Galloway Slaying

Witness Gave Ride To Suspect

Murder Suspect Also Sought in Atlanta Paper

Fugitive Suspect's Fingerprints Found

Atlanta Police Also Seek Galloway Killing Suspect

Galloway Suspect Indicted in Fulton

Arrest Made in Galloway Murder Case

Brooks Returns For Murder Trial

Brooks Indicted For Galloway Slaying

ne to the Columbus media at a period of high crime activity in Muscogee County. This period was also the time of the publicity and pretrial activity in Georgia v. Brooks, although I was not working on the publicity in that case at the time. The Patrick case pretrial publicity was very prejudicial to the defendant, and I was generally critical of how that case was handled in the press.

10) In 1977 the local media reaching most people in Muscogee County consisted of two daily newspapers, three commercial television stations, and ten radio stations. Although I was given no electronic media material to analyze, it is important to know of the news coverage given by such an array of media in Muscogee County. Research shows that the U.S. public gets 65 percent of its news from television, and radio is the most ubiquitous news medium in our society. Radio's ability to follow citizens to and from work in cars, to be present at the work place, and to be in many parts of the home, makes its reach very significant. The electronic media do not keep their records for public inspection for extended periods, as do newspapers, hence such electronic material is seldom available for analysis after a period of four years.

11) In Georgia v. Brooks the media's coverage was 23 news days. A news day is a day when a major development in a case takes place, resulting in coverage in all of the media on that day. There was news coverage of this case on more than 23 days in the newspapers, but some developments were not of character to be major enough for coverage in all media. Newspapers in our society produce the most thorough coverage of news, and the most coverage in great depth. The electronic media gets much of its news from the print media. Using a conservative estimate, on each of the 23 news days the television stations would have four newscasts each, the AM radio stations eight newscasts each, and the FM radio stations four newscasts each. This means that on each newsday the electronic media had some 76 newscasts in Muscogee County, for a total during the 23 news days of some 1848 newscasts. Hence the prospective jurors in Muscogee County were exposed to news about the incidents of Georgia v. Brooks a conservatively estimated 1848 times on television and radio. This is massive coverage.

12) In 1977 the daily newspapers had the following circulation: The Columbus Enquirer, 34,215; The Columbus Ledger, 31,975, the papers combined on Saturdays, 62,434; the papers combined on Sundays, 66,623. At an estimated two readers per newspaper, a newspaper was being read daily by over 120,000 readers. The 1977 census figure

Appeal, 1936-1968", "The South's Standard Newspaper: The Atlanta Constitution in the 1960's", "Political Attitudes in Letters to the Editor Columns of Urban Daily Newspapers in Eleven Southern States in the Sixties". At present I have concluded a content analysis of eleven Southern urban daily newspapers, coverage of the news in the 1960's, to be published by the Southern Regional Council.

7) I have prepared content analyses of newspaper and electronic coverage of specific criminal incidents for defense counsel in many criminal cases heard in Georgia Superior Courts in Baldwin Coun ty, Fulton County, Muscogee County, Sumter County, Oglethorpe County, Lanier County, DeKalb County, Tattnall County and Terrell County. In most of these cases a hearing was held regarding the impact of publicity on voir dire and venue issues. In each of these instances I was qualified as an expert and testified to the results of these studies. I have prepared content analyses for cases in Weakley County, Tennessee; Houston, Texas; Pike County, Kentucky; Boone County, Ky.; Pinellas County, Florida; Hartford, Conn.; Boston, Ma.; and Chattanooga, Tenn. In cases in the Federal Court system I have prepared content analyses in the Northern, Middle, and Southern Districts of Gkorgia, the Columbia division of the South Carolina district court, the Middle District of Florida, the Middle District of Tennessee, the Eastern District of Virginia, and the Eastern District of North Carolina.

8) I have been asked by defense counsel to analyze newspaper pretrial publicity in the case of Brooks v. Georgia. The material consisted of 31 newspaper pieces from The Columbus Enquirer and The Columbus Ledger, the two daily papers in Columbus. In addition, on August 19, 1981, I traveled to Columbus and spent seven hours reading the microfilm copies of the newspapers from July 15, 1977, the first day of coverage in this case, through November 14, 1977, the day before the trial began. This study produced two more pieces of coverage, for a total of 33 pieces for analysis. I was not given any radio or television material to analyze. This library research in Columbus also revealed the details of crime coverage in Columbus media during a period of public hysteria generated by a series of local murders.

9) By coincidence, I did an analysis of pretrial publicity in Georgia v. Patrick, a capital case in Muscogee County. I traveled to Columbus twice on that case, on August 19, 1977, and on September 9, 1977, once to do research on the publicity in the public library, and once to testify in a pretrial hearing. In addition, I was guest speaker on September 23, 1977, at a meeting of the Columbus Press Club, on the subject of coverage of crime stories by the media. This work in Columbus introduced

STATE OF GEORGIA)
)
COUNTY OF DEKALB)

AFFIDAVIT OF LAWRENCE E. NOBLE, JR.

LAWRENCE E. NOBLE, JR., being duly sworn, deposes and says:

1) I am an Associate Professor of Political Science at Atlanta University where I teach course on the following subjects to graduate students: The Judicial Process; The Jury; U.S. Constitutional Law; The Constitution and Civil Liberties; Techniques of Political Control: The Mass Media; Techniques of Political Control: The Economic and Political Power of the American Legal Profession; Public Opinion and Propaganda; The U.S. Supreme Court; and Prison, Prisoners, and Prisoners' Rights.

2) I received a Bachelor of Arts degree in 1950 from the University of Mississippi, a Masters of Arts degree in Political Science in 1953 and a Ph.D. degree in Political Science in 1955 from Duke University. I taught at Centre College of Kentucky from 1954 to 1962, University of Mississippi 1962 to 1963, Drew University from 1963 to 1966, Southwestern at Memphis from 1966 to 1968 and Atlanta University from 1968 until present.

3) I am a retired LCDR in the U.S. Naval Reserve (communications intelligence).

4) I am a member of the National Jury Project, Inc., located at 1502 Healey Building, Atlanta, Georgia 30303. The National Jury Project is a not-for-profit corporation specializing in the study of jury systems and voir dire procedures. The organization has three other regional offices in Oakland, Ca., Boston, Ma. and Minneapolis, Mn.

5) I also serve as a jury consultant to Team Defense, Inc. in Atlanta, Georgia, and to local Atlanta and other law firms in the state of Georgia and in other states.

6) One of my areas of expertise as a jury consultant is the thematic analysis of the content of newspaper and electronic coverage. My research and writing includes many studies analyzing the quantity and evaluative content of newspapers. I have written and delivered papers reporting the results of the studies of newspapers on the following topics: "The Editorial POlicy of the Memphis Commericial

Application No. 2001

RECEIVED 5-20-82

SUPREME COURT OF GEORGIA

ATLANTA, May 18, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM ANTHONY BROOKS V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this Application, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., Smith and Gregory, JJ., dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hufford, Deputy Clerk.

Application No. 2001

RECEIVED 4-23-82

SUPREME COURT OF GEORGIA

ATLANTA, April 21, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM ANTHONY BROOKS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., Smith and Gregory, JJ., dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

having been found to be without merit, the Petition is denied.

SO ORDERED, this 2nd day of February, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

convincing to show arbitrary and capricious application of the death penalty in Georgia. Furthermore, Petitioner has not demonstrated any intentional discrimination against him in the imposition of his death sentence. Smith v. Balkcom, 660 F.2d 573 (1981).

Accordingly, this claim for relief is found to be without merit.

76-79

In paragraphs 76-79, Petitioner attacks the statutory provisions and practices governing appellate review of death sentences generally and as applied in his case.

Georgia's capital sentencing statute has been held constitutional. Gregg v. Georgia, supra; Smith v. Balkcom, supra.

Accordingly, this allegation is found to be without merit.

80-82

In paragraphs 80-82, Petitioner attacks the means by which his death sentence will be administered.

The Court finds this allegation to be without merit.

WHEREFORE, all allegations in the Petition

adversely to Petitioner. Brooks v. State, 244 Ga. at 583(5).

The Court has already concluded the prosecutor's closing argument in the sentencing phase was not improper (see paragraphs 48-50) and that the jury charge was not improper (see paragraphs 51-58).

Accordingly, the claim for relief in paragraphs 59-64 is found to be without merit.

65-68

The Supreme Court has expressly upheld the application of the (b)(7) aggravating circumstance. Brooks v. State, 246 Ga. at 262.

69-75

In paragraphs 69-75, Petitioner claims his death sentence is being exacted pursuant to a pattern and practice of arbitrary and capricious infliction in the State of Georgia.

FINDINGS OF FACT

Petitioner offered expert testimony to the effect that the death penalty is being arbitrarily imposed in Georgia (H.T. 79-109), but the Court finds the evidence unconvincing.

CONCLUSIONS OF LAW

Georgia's death penalty statute is constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh den 429 U.S. 875, 97 S.Ct. 197, 198, 50 L.Ed.2d 158 (1976). The Court does not find the evidence is

at the sentencing portion of trial. (R. 25-26).

CONCLUSIONS OF LAW

Georgia's death penalty statute requires the sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence..." Ga. Code Ann. §27-2534.1(b). This includes prior criminal convictions and pleas of guilty or nolo contendere of the defendant, provided the State has given the defendant notice prior to trial. Fair v. State, 245 Ga. 868, 873-74 (1980). Cf. Ga. Code Ann. §27-2503.

As to the admissibility of a defendant's general character, there is statutory authority for allowing this kind of evidence in the presentencing hearing, subject to prior notice by the State. Dudley v. State, 228 Ga. 511 (1972); Fair v. State, supra. Cf. Agnor's Ga. Evid. §10-5.

Further, where character is put in issue, the direct examination must relate to general reputation, whether good or bad, May v. State, 185 Ga. 335, 339 (1938), Horton v. State, 228 Ga. 690, 697 (1972), as was done by the State in this case. (T. 838-839).

As to Petitioner's allegation that the trial court limited his presentation of mitigating evidence, the Supreme Court has already ruled on this issue

CONCLUSIONS OF LAW

The Supreme Court has already concluded the (b)(7) aggravating circumstances was properly applied. Implicit in this holding is the conclusion that the jury charge sufficiently channeled the jury's discretion.

Mitigating circumstances are not required to be singled out. Thomas v. State, 240 Ga. 393 (1977). However, the trial judge clearly defined mitigating circumstances and told the jury what the functions of mitigating circumstances would be in their deliberations. The charge meets the requirements laid out in Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, these allegations are found to be without merit.

59-64

In paragraphs 59-64, Petitioner claims he was denied a fair hearing on the issue of punishment in violation of his constitutional rights. Specifically, Petitioner challenges the admissibility of a prior conviction and evidence of general bad character; the rulings of the trial court which allegedly limited Petitioner's offer of evidence in mitigation; the closing argument of the prosecution; and, the portions of the jury charge on (b)(7) and mitigating circumstances.

FINDINGS OF FACT

Prior to Petitioner's trial, the State gave him notice of its intent to introduce a prior conviction and evidence of his general bad character in aggravation

51-58

In paragraphs 51-58, Petitioner contends the portions of the jury charge in the sentencing phase as to the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance and as to mitigating circumstances deprived him of his Eighth and Fourteenth Amendment rights.

FINDINGS OF FACT

The Supreme Court has expressly upheld the application of the (b)(7) aggravating circumstance. Brooks v. State, 246 Ga. at 262.

As to mitigating circumstances, the trial court charged the jury:

> "In arriving at your determination, you are authorized to consider all evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.
>
> Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."

(T. 886-887).

CONCLUSIONS OF LAW

A prosecutor may argue for a death sentence and offer plausible reasons for his position. Allen v. State, 187 Ga. 178, 182 (1938); Strickland v. State, 209 Ga. 675(2)(1953); Chenault v. State, 234 Ga. 216, 224 (1975). He may urge severe punishment. Bailey v. State, 153 Ga. 413(4)(1922); Chenault v. State, supra. Protection of the community is one consideration a jury is entitled to entertain in determining an appropriate sentence. Chenault v. State, supra.

The Court has examined the prosecutor's closing argument (T. 859-873) and found nothing improper. Leutner v. State, 235 Ga. 77, 84 (1975); Chenault v. State, supra; Redd v. State, 242 Ga. 876(4)(1979).

Accordingly, this allegation is found to be without merit.

charge on a lesser included offense would have been found in Petitioner's confession. The trial judge apparently considered this evidence insufficient to warrant a charge on a lesser crime. Petitioner has not shown the trial court abused its discretion.

Petitioner has also objected to a portion of the charge on reasonable doubt which provided, "...neither does it mean a possibility that the defendant may be innocent." (T. 824). The Supreme Court rejected this challenge in Bruster v. State, 228 Ga. 651(2) (1972).

Accordingly, the claim for relief in paragraphs 44-47 is found to be without merit.

48-50

In paragraphs 48-50, Petitioner alleges the prosecutor made an improper, inflammatory closing argument in the sentencing phase which violated Petitioner's constitutional rights.

FINDINGS OF FACT

In conducting its sentence review, the Supreme Court concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Brooks v. State, 244 Ga. at 584.

For this reason alone, the Court denies relief.

The Court also refuses to hold Counsel were ineffective for failing to object to the charge as given.

44-47

In paragraphs 44-47, Petitioner alleges that the trial court's refusal to charge on lesser included offenses and its instruction on reasonable doubt in the guilt/innocence phase violated his Fourteenth Amendment rights.

FINDINGS OF FACT

The trial court refused to charge the jury on voluntary and involuntary manslaughter, which defense counsel had requested in writing, because the requests were "not adjusted to this evidence." (T. 788).

CONCLUSIONS OF LAW

The trial judge may in his discretion charge on the lesser crime of that included in the indictment or accusation. State v. Stonaker, 236 Ga. 1, 2 (1976). Failure of a trial judge to do so, despite a written request, is not error if the evidence does not warrant such a charge. Id.

Here, Petitioner did not testify except during the Jackson-Denno hearing outside the presence of the Jury. (T. 731). Therefore, any evidence to support a

Accordingly, this claim for relief is without merit.

40-43

In paragraphs 40-43, Petitioner contends that the jury charge on malice and intent in the guilt/innocence phase were impermissibly burden-shifting, thereby violating his constitutional rights.

FINDINGS OF FACT

The Court has examined the portions of the jury charge on intent (T. 825-826) and malice (T. 831-832).

CONCLUSIONS OF LAW

There is no question that the charge is erroneous under present law. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Hosch v. State, 246 Ga. 417, 420 (1980).

At the time the charge was given, however, the charge was not erroneous under existing state law. Patterson v. State, 239 Ga. 409(4)(b)(1977).

The issue of whether Sandstrom should be given retroactive effect is undecided. Tyler v. Phelps, 622 F.2d 172, 175 n. 4 (5th Cir. 1980); Lackey v. State, 246 Ga. 331, 338 n. 3 (1980). In view of the unsettled nature of this rule, the Court rules that the principle of Sandstrom does not apply.

be drawn by the evidence and did not amount to a personal opinion. Shy v. State, 234 Ga. 816, 824 (1975); Shirley v. State, 245 Ga. 616, 617 (1980).

In that the Court has concluded the prosecutor did not exceed the permissible bounds of argument, the Court does not find Counsel were ineffective in failing to object.

38-39

In paragraphs 38-39, Petitioner alleges that the failure to transcribe all bench conferences denied him his Sixth Amendment right to counsel and Fourteenth Amendment right to due process and equal protection of laws.

FINDINGS OF FACT

Counsel filed a Motion for Complete Recordation of all Proceedings. (R. 21). The motion was mutually agreed upon by the prosecutor, defense counsel, and the trial court. (H.T.3).

CONCLUSIONS OF LAW

The court reporter's failure to transcribe all bench conferences in a death penalty case does not constitute reversible error per se where the appellant does not demonstrate any harm or prejudice therefrom. Davis v. State, 242 Ga. 901 (1979).

Petitioner has not demonstrated any prejudice or harm resulting from the failure to record all bench conferences.

of sworn testimony.

Accordingly, the allegations in paragraphs 32-34 are found to be without merit.

35-37

In paragraphs 35-37, Petitioner contends the prosecutor made improper opening and closing arguments during the guilt/innocence phase which violated Petitioner's constitutional rights.

FINDINGS OF FACT

The Court has examined both the opening and closing arguments of the prosecution in the guilt/innocence phase of trial. (T. 464-478; 801-820).

CONCLUSIONS OF LAW

A prosecutor may comment on a defendant's failure to produce evidence. Wood v. State, 234 Ga. 758(2)(1975); White v. State, 242 Ga. 21(5) (1978). Thus, the prosecutor's comment upon defense counsel's failure to outline a defense was not improper.

Petitioner has also claimed the prosecutor expressed his personal opinion as to the veracity of a witness, but the Court does not agree. In that Captain Graham's testimony (T. 711-712) and Ms. Brooks' testimony (T. 767-768) were conflicting, the jury would ultimately believe one witness and not believe the other. Such an inference could

and state that he never told me there was anything wrong with this statement, I'm willing to swear to that. " (T. 654).

CONCLUSIONS OF LAW

In view of the fact that the requirement that the trial judge administer oaths to jurors was not in effect at the time of Petitioner's trial, the Court finds Petitioner's claim of harm arising from the administration of the oath to jurors by the prosecutor to be without merit.

The prosecutor's reference to Petitioner as "the prisoner at bar" during voir dire was not improper. Cf. Ga. Code Ann. §59-806; Collier v. State, 232 Ga. 282 (1974).

Petitioner has made no showing of harm or prejudice resulting from the failure to record all bench conferences. Davis v. State, 242 Ga. 901 (1979).

Finally, under Georgia law, attorneys are officers of the court, and a statement by an attorney to the court "in his place" is prima facie true and needs no further verification unless the same is required by the trial court or the opposing party. Caldwell v. McWilliams, 65 Ga. 100 (1880); Whitehead v. State, 96 Ga. App. 382 (1957). Thus, the prosecutor's statement made in his place was not opinion but was the equivalent

Accordingly, this allegation is found to be without merit.

32-34

In paragraphs 32-34, Petitioner alleges that the trial was conducted in such a manner as to deprive him of his right to a fundamentally fair trial. Specifically, Petitioner complains of the oath being administered to jurors by the district attorney, the prosecutor's referring to Petitioner as "prisoner" during voir dire, bench conference between the prosecutor and trial judge, and the prosecutor's statement following testimony of a prosecution witness.

FINDINGS OF FACT

Petitioner's trial occurred in November, 1977. Ga. Code Ann. §59-704.1, requiring the trial judge to administer oaths to jurors, became effective July 1, 1979.

During voir dire, the district attorney asked, "Have you any prejudice or bias resting on your mind either for or against the prisoner at bar?" (T. 397).

After defense counsel had elicited inconsistent statements from a prosecution witness on cross-examination, the district attorney pled entrapment and was permitted to cross-examine the witness. (T. 648). Following his cross-examination of the witness, the prosecutor stated, "If Your Honor please, I stand in my place

his preliminary hearing.

Under former Ga. Code Ann. §59-806(1), jurors could be excused for forming or expressing an opinion from having heard testimony under oath. Johnson v. State, 209 Ga. 333(2)(1952). The Court finds that Petitioner's statement reported from his preliminary hearing was the equivalent of testimony under oath, so that jurors having read the confession had, in effect, read testimony given under oath. The trial court apparently determined for itself that the reading of this detailed confession destroyed any impartiality a juror may have had. United States v. Davis, 583 F.2d 190, 196-87 (5th Cir. 1978).

Finally, Petitioner claims the trial court prevented meaningful voir dire. The Court finds this allegation to be without merit.

Accordingly, the allegations in paragraphs 23-26 are found to be without merit.

27-31

In paragraphs 27-31, Petitioner claims the admission into evidence of his statement to police violated his Fifth, Sixth, and Fourteenth Amendment rights.

The Supreme Court had already concluded the State carried its burden of proving the admissibility of Petitioner's confession. Brooks v. State, 244 Ga. at 581.

assistance by failing to file a timely challenge to the grand jury composition and failing to present evidence in an effective manner upon their challenges to the traverse jury composition.

Failure to challenge arrays of grand and traverse juries is not a ground of ineffective assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193 (1979). Accordingly, Petitioner's challenge to the grand jury composition is deemed waived.

As to the traverse jury, Petitioner would have the Court find Counsel ineffective for not prevailing on their traverse jury challenge. Yet, Petitioner has not demonstrated that the jury pool from which the panel was drawn was impermissibly composed or that the selection process was less than neutral, Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), in order to establish actual prejudice.

In that Petitioner has not shown a challenge to the traverse jury could have been successful, the Court cannot find Counsel were ineffective for not succeeding on their two challenges.

Petitioner has also claimed the trial court used an improper standard for excluding jurors for cause. The "commitment", of which he complains, was to exclude any juror who had read Petitioner's statement which the press had recorded in detail at

As to Petitioner's alleged confession, the Police Department had given the details of the confession to the newspapers. (T. 45). Petitioner's preliminary hearing in the Recorder's Court was held in open court with the press present, and the press "recorded his alleged confession in detail." Id. The trial judge explained that "just because the newspapers print some alleged statement by the defendant, will not necessarily be grounds for excusing for cause. But, I did commit myself to Mr. Cain, Sr. in his motion for change of venue that any juror who said they read the alleged statement of this defendant in the paper, I would excuse for cause...." (T. 46).

CONCLUSIONS OF LAW

The right to object to the composition of a grand or traverse jury in a habeas corpus proceeding under Georgia law will be deemed waived unless Petitioner shows in the Petition and satisfies the Court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final. Ga. Code Ann. §50-127(1). Under federal law, an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

The "cause" asserted by Petitioner in this case is that his trial counsel rendered ineffective

CONCLUSIONS OF LAW

In that both jurors indicated they could not vote to impose the death penalty under any circumstances, the Court finds no violation of Witherspoon.

Accordingly, this claim for relief is found to be without merit.

23-26

In paragraphs 23-26, Petitioner claims he was denied his right to a representative, impartial jury by the jury selection procedures. Specifically, Petitioner alleges Blacks were excluded from grand and petit jury venires, that the trial court used an improper standard for determining challenges for cause, and that the trial court prevented any meaningful voir dire to develop challenges for cause.

FINDINGS OF FACT

Counsel twice challenged the array of traverse jurors during voir dire, but the challenges were overruled. (T. 11-12; 404). In denying the first challenge, the trial judge explained that he had drawn the names out of the jury box pursuant to provisions of the law, without any knowledge of each individual's race, and that it was "just a circumstance" that few Blacks were on the panel. (T. 12).

Accordingly, the claim for relief in paragraphs 10-15 is found to be without merit.

16-19

In paragraphs 16-19, Petitioner alleges that the exclusion of jurors having conscientious or religious scruples against the death penalty violated his right to a representative, impartial jury as guaranteed by the Sixth, Eighth, and Fourteenth Amendments and Sections 2-101 and 2-111 of the 1976 Georgia Constitution.

This argument has been rejected in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 776 (1968), and Smith v. Balkcom, 660 F.2d 573 (1981).

Accordingly, this allegation is found to be without merit.

20-22

In paragraphs 20-22, Petitioner claims two jurors were improperly excluded under Witherspoon v. Illinois, supra, thereby violating his Sixth and Fourteenth Amendment rights.

FINDINGS OF FACT

Jurors Holmes (T. 421) and Nix (T. 424) indicated they could not vote to impose the death penalty no matter what the facts or circumstances of the case would be.

Amendments and under the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already decided this issue adversely to Petitioner. Brooks v. State, 244 Ga. at 756.

Petitioner presented expert testimony on the issue of pretrial publicity in this case. (H.T. 20-61; Affidavit of Lawrence E. Noble, Jr.). The Court finds that the opinion offered by the expert amounts to an opinion that the trial court was wrong.

CONCLUSIONS OF LAW

The finding of the Supreme Court on this issue is binding upon this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750.

Petitioner has claimed Counsel were ineffective for not presenting additional expert evidence on the change of venue issue, including expert testimony like that presented here. The Court is not convinced that such evidence, if presented, would have made any difference in the decision to deny a change of venue. The decision whether to have presented expert testimony falls within the realm of trial tactics and strategies which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). The Court cannot conclude Counsel were ineffective on this ground.

contention, Petitioner offered expert testimony to the effect that voir dire here was not in-depth enough to establish a sufficient basis from which to exercise challenges. (H.T. 61-78). The Court is not persuaded by Petitoner's evidence and does not find Counsel ineffective for this reason.

Petitioner has also claimed Counsel were ine fective for failing to present evidence in mitigation in an effective manner during the sentencing phase. Petitioner complains of Counsel's calling 3 family members to testify and of not using expert witnesses. However, Petitioner has made no showing that other evidence or witnesses were available or would have been helpful.

Finally, Petitioner charges that Counsel were ineffective in consenting to television coverage of Petitioner's trial. Petitioner consented to the coverage. (Volume re Cameras at Trial, November 16, 1977). He has made no showing of any prejudice or harm arising from the coverage.

Accordingly, the claim for relief in paragraphs 7-9 is found to be without merit.

10-15

In paragraphs 10-15, Petitioner contends the failure of the trial court to grant a change of venue violated his right to a fair trial by an impartial jury as guaranteed by the Sixth, Eighth, and Fourteenth

the sentencing phase (T. 841; 847; 855); and made closing arguments in both the guilt/innocence and sentencing phases (T. 789; 874).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meet the test. They prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort they put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has cited specific instances in which he contends Counsel were ineffective. Several of these instances are related to claims raised elsewhere in the Petition and will be addressed below. (For ineffectiveness as to: change of venue motion, see paragraphs 10-15; challenge to array of petit jurors, see paragraphs 23-26; prosecutor's arguments, see paragraphs 35-37 and 48-50; jury charge on malice and intent, see paragraphs 40-43; and, State's evidence in aggravation, see paragraphs 59-64).

Petitioner has also claimed Counsel failed to conduct a proper voir dire. In support of his

Among the pretrial motions filed by Counsel were a Motion for Continuance; Motion for Change of Venue; Motion for Individual Voir Dire; Motion to Prohibit Jury Dispersal; Motion for Complete Recordation of All Proceedings; and Motion to Compel Disclosure. (R. 16-24). The Motions for Individual Voir Dire and Sequestration, Prohibiting Jury Dispersal, and Complete Recordation were consented to by the prosecution and the trial court and thus were granted. (M.T. 3).[2] The Motion for Change of Venue was denied. (M.T. 34).

During voir dire Counsel twice challenged the array of traverse jurors on the ground that Blacks were underrepresented, but the challenges were overruled. (T. 11-12; 404). Counsel also renewed the Motion for Change of Venue, but the Motion was denied. (T. 354-355).

At trial, Counsel reserved the right to make an opening statement until the presentation of Petitioner's case. (T. 478); cross-examined State's witnesses (T. 489; 496; 509; 516; 525; 534; 539; 547; 554; 565; 570; 576; 582; 602; 612; 618; 628; 633; 643; 653; 657; 662; 668; 681; 689; 700; 710; 724; 748; 761; 839); offered 3 witnesses during the guilt/innocence phase (T. 766; 771; 777); presented 3 witnesses during

---

[2] Motions Hearing Transcript of September 30, 1977.

262 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 83 numbered paragraphs, of which 76 contain substantive claims for relief (7-82). The Court will rule on these claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

The record in this case consists of the transcript of the proceedings before this Court on November 12, 1981; the affidavits of Peter W. Tague and Lawrence E. Noble, Jr.; and the transcript and record of Petitioner's trial in Muscogee County Superior Court.

7-9

In paragraphs 7-9, Petitioner claims he was denied the right to effective assistance of counsel as guaranteed by the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by several attorneys. Mr. William S. Cain, Sr., was initially appointed to represent Petitioner; at his request, Mr. William S. Cain, Jr., was appointed to serve as co-counsel. (R. 15). Mr. Cain, Sr., withdrew prior to trial; Mr. Patrick J. Araguel, Jr., and Mr. Jerry D. Sanders replaced him. (T. 2, 45).

FEB 04 1982

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ANTHONY BROOKS,	:	
	:	
PETITIONER	:	
	:	
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	FILE NO. 5142
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Muscogee County. Petitioner was convicted of murder, kidnapping, rape, and armed robbery. He was sentenced to death for murder, to life for kidnapping and rape, and to twenty years' imprisonment for armed robbery. The Supreme Court affirmed his convictions and sentences. Brooks v. State, 244 Ga. 574 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey.[1] Upon reconsideration the Supreme Court reaffirmed the death sentence. Brooks v. State, 246 Ga.

[1] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ANTHONY BROOKS,

Petitioner

-against-

STATE OF GEORGIA,

Respondent.

APPENDIX

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COUNSEL FOR PETITIONER

denies petitioner his right to due process as well as his right to rational review of his sentence of death guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

Therefore, because the discretion of the jury was not sufficiently channeled and directed to avoid the arbitrary imposition of the death penalty, petitioner was sentenced to death in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

For the reasons stated herein, William Anthony Brooks asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

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JJ). As Mr Justice Marshall stated:

> Such a defect could not be curred by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it has been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshal, J., concurring)

The Georgia Supreme Court upheld the finding of the jury under subsection (b) (7) upon remand from the United States Supreme Court on the basis of its conclusion that the victim was tortured, 271 S.E.2d at 173, */ an assertion which was made at the sentencing hearing by the prosecution or found by the jury. The Court's speculation as to what the jury found based upon its review of a cold record is inconsistent with Godfrey, Gregg, Furman and Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell and Stevens, JJ.) See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). In the absence of any specific and precise findings by the triers of the facts, an appellate court may not make belated findings of fact on the basis of evidence in the record below and use those findings to correct or bloster the verdict. Speculation on appeal as to the basis of the jury's sentence

---

*/ The Georgia Supreme Court also based its reaffirmation of petitioner's death sentence upon its decision in Gates v. State, 244 587, 599, 261 S.E.2d 349, 258 (1979), that were two or more statutory aggravating circumstances and found, the failure of one does not invalidate the sentence of death. However, the Court of Appeals for the Fifth Circuit reached the opposite conclusion in Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980).

Georgia, supra, in that the instructions "gave the jury no guidance concerning the meaning of any of Section (b) (7)'s terms. In fact, the jury's interpretation of Section (b) (7) can only be the subject of sheer speculation." Id at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Therefore, petitioner is entitled to a new sentencing hearing at which the sentencer's discretion is proerly directed and channeled as required by Furman, Gregg, and Godfrey.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

Godfrey, supra at 437 (Marshall, J., concurring) [citations omitted]. The fact that the jury found depravity of mind "to the victim" in its written findings of aggravating circumstances after being instructed on aggravated battery strongly indicates that the jury did not understand the statutory aggravating circumstances or properly apply them to the facts of petitioner's case in deciding to give him the death penalty.

Because the discretion of the jury was not properly guided, petitioner's sentence of death must be vacated. Under Ga. Code Ann. Sections 26-3102, 27-2534.1(c), the sentencing authority in death cases is the jury. Once the penalty has been imposed in the exercise of unbridled discretion by the jury, it cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences bythe Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens,

application of the statue to the facts of the case.

The trial court also instructed the jury as follows:

> In arriving at your determination, you are authorized to consider all the evidence received throughout this trial presented by the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigating and aggravation.
>
> Mitigating circumstances are those which do not constitute a justification or execuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral cuplability or blame.
>
> Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

Tr. 886-87, R. 28.

The jury was provided with a form permitting it to base a recommendation of death upon a single aggravating circumstance, a combination of aggravating circumstances or multiple aggravating circumstances independent of one another. The jury recommendation stated the following statutory aggravating circumstances: "armed robbery, and rape, and the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim." Tr. at 890 [emphasis added]. There was no finding of aggravated battery or torture by the jury.

Petitioner contends that the trial court did not properly guide the discretion of the jury as required by the Eighth and Fourteenth Amendments to the Constitution of the United States. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

The trial court's instruction on aggravating circumstances did not indicate to the jury that its consideration of aggravating circumstances was limited to those alleged by the state as being the basis for the death penalty in petitioner's case. With regard to the aggravating circumstance contained in section (b) (7), the trial court's instruction has the same defect found to exist in Godfrey v.

People v. Bernette, 197 N.E.2d 436(Ill. 1964); Sier v. State, 417 P.2d 803, 805 (Okla. Crim. App. 1973). He argued that petitioner should be given death because he had a lawyer and the decedent did not. Tr. 867. And he repeatedly played on the climate of fear and tension in the community, finally urging the jurors to send a message to "William Brooks . . . and every other criminal like him, by voting for electrocution. Tr. 871. Indeed, it cannot be said that any argument made by the prosecutor was beyond criticism.

Taken individually, each argument constitutes blatant, improper conduct. Taken as a whole, the argument contains a collection of prejudicial misconduct exceeding that in any reported case -- capital or not. This argument cannot be permitted to stand as a constitutional permissible closing argument in a capital punishment case. See Gardner at 358. Because the holding of the Georgia courts in this case conflict with the decisions of many other state and federal courts and because this is a capital case, this Court should grant review of this petition.

III. THE PENALTY OF DEATH IS INVALID IN PETITIONER'S CASE BECAUSE THE TRIAL COURT DID NOT PROPERLY GUIDE THE DISCRETION OF THE JURY AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's jury was instructed orally and in writing that it could impose the death penalty if it found any one of three statutory aggravating circumstances contained in Ga. Code Ann. Sec. 27-2534.1. Under subsection (b)(2) of the statute, it was instructed that it could impose death if it determined that the offense of murder was committed in the commission of either or both of two other capital felonies, rape and armed robbery. Tr. at 885-886. It was also instructed that it could return a death sentence pursuant to subsection (b) (7) if it found that "[t]he offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim." Tr. at 886 [emphasis added]. There was no mention of the other two components of (b) (7): depravity of mind or torture. The jury was given no definition of any of the terms of section (b) (7) or any other guidance in the

escape and kill someone else's girlfriend or daughter." Tr. 868-69. Attempt to inflame the emotions of the jury by conjuring up the risk of escape constitutes reversible error. See People v. White, supra, 72 Cal. Rptr. at 878-79, 446 P.2d at 998 (argument in a penalty proceeding that the defendant should be executed because he was likely to escapt a second time held to be improper and unduly speculative); See generally Brown v. Estelle, supra, 468 F. Supp. at 48.

The prosecutor went on to argue that the jurors should vote to execute Brooks to save themselves the cost of housing, feeding and clothing him in prison. Tr. 869. Appeals to the jurors at taxpayers are "clearly indefensible" in capital cases and require that petitioner's death sentence be vacated. State v. Jordan, 294 P.2d 677 (Ariz. 1956); Commonwealth v. Clark, 185 A.2d 764, 765-66 (Pa. 1936); State v. Owen, 253 P.2d 203, 211-12 (Ida. 1953), overruled in part on other grounds, 486 P.2d 84 (Ida. 1971). Indeed, the principle that a decision maker should not have a financial interest in the outcome of a case -- and under no circumstances should be reminded of any interest he has — is so firmly entrenched that it is applied even when the consequences of the decision are far less than electrocution. See Tumey v. Ohio, 273 U.S. 510 (1927) ($100 fine); Finney v. G.C. Murphy Co., 161 A.2d 385 (Pa. 1960) ("entirely improper" to argue in tort case that judgment for plaintiff would require increase in insurance premiums); West v. State, 150 S.W.2d 363 (Tex. Ct. Civ. App. 1941) (argument in condemnation proceeding that, as taxpayers, jurors will have to cover judgment requires reversal even without objection); Lufkin v. City of Bakersfield, 20 P.2d 788 (Cal. Ct. App. 1933) ("exceedingly improper" to tell juror that judgment against city would be vorne by taxpayers.

The prosecutor also appealed to the jury to impose the death penalty out of sympathy for the decedent and her family, who would not have her home for Thanksgiving which was the week after the trial. Tr. 861. Such arguments have repratedly been held improper. See Williams v. Henderson, 451 F. Supp. 328, 332 (E.D.N.Y. 1978);

United States, 419 F.2d 582, 587 (5th Cir. 1969); United States v. Chrisco, 493 F.2d 232, 237 (8th Cir.), cert. denied, 419 U.S. 847 (1974); United States ex rel. Clark v. Pike, 538 F.2d 750, 759 (7th Cir., 1976), cert. denied, 429 U.S. 1064 (1977). Moreover, this argument suggested to the jury that considerations other than the statutory aggravating circumstances could be considered in determining whether to give petitioner the death penalty.

Additionally, the prosecutor's statement of his personal opinions and the decision-making process of his office is also prejudicial because it implies that the prosecutor has additional information not admitted into evidence (the prosecutor had already told the jury this during his opening statement:, Tr. 477-78), see United States v. Somers, 496 F.2d 723, 740 (3rd Cir.), cert. denied, 419 U.S. 832 (1974), and because the jury is likely to give undue weight to the opinion of an elected government representative, Berger v. United States, 295 U.S. 78, 88 (1935).

After providing the jury with all this extrinsic and prejudicial information, the prosecutor emphasized that the jury would not be responsible for petitioner's life if it voted for the death penalty. Tr. 865-66. But it is essential that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971). Arguments seeking to diminish the juror's responsibility and recognition that they alone are to select the proper punishment are therefore improper and defeat the purpose of jury sentencing. People v. White, 72 Cal. Rptr. 873, 878, 446 P.2d 993, 998 (1968) (reversible error for prosecutor to argue that "It is not the 12 of you alone. It is everyone who has had a connection with the case that will have the consequences of the imposition of the maximum penalty.") See also, State v. Jones, 251 S.E.2d 425, 427-28 (N.C. 1979); State v. Mount, 152 A.2d 343, 351 (N.J. 1959).

The prosecutor also argued for execution because of the risk that petitioner might kill a prison guard or a fellow prisoner, or

The prosecutor repeatedly referred to matters outside the record in arguing to the jury the practices of the District Attorney's office in seeking the death penalty, Tr. 862-64; the deterrent value of the death penalty, Tr. 860; and the likelihood of petitioner escaping from prison, Tr. 868-69. Because all of these assertions were not supported by evidence in the record, the arguments were blantantly improper. See Brown v. Estelle, supra at 45; White v. State, 492 S.W.2d 488 (Tex. Ct. Crim. App. 1973); Gilbert v. State, 536 P.2d 929, 932 (Okla. Crim. App. 1975). More significantly, even if the argument had been based on the record, it could only distract the jury from its delegated role of determining whether statutory aggravating circumstances had been established and, if so, whether death was the appropriate punishment. See People v. Love, 17 Cal. Rptr. 481, 486, 366 P.2d 809, 814 (1961), where an argument about the deterrent value of capital punishment was held to be improper; Gregg v. Georgia. v. Georgia, 428 U.S. 153, 186 (1976) ("the value of capital punishment as a deterrent of crime is a complex factual matter the resolution of which properly rests with the legislature"); Embrey v. State, 214 So.2d 567, 570-71 (Ark. 1969) (defendant also unable to present testimony about deterrent value of capital punishment).

After asserting that his office seldom requests the death penalty, the prosecutor outlined for the jury the process by which the District Attorney's office determined the death penalty to be appropriate for petitioner. Only after considering the horrible nature of the crime, the overwhelming proof of guilt and the fact that "there's no chance that William Anthony Brooks will ever be rehabilitated," did the District Attorney's office decide to seek the death penalty, the prosecutor told the jury. Tr. 862-64. This argument not only had no basis in the record, but it improperly injected the weight of the prosecutor's office into the jury's decision-making process. See Brown v. Estelle, supra, 468 F. Supp. at 46. Such an argument is no different in logic or in effect from the statement that "we only prosecute the guilty," which has uniformly been recognized as prejudicial error. See e.g., Hall v.

No. 82 5090

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ANTHONY BROOKS,

Petitioner

-against-

STATE OF GEORGIA,

Respondent.

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MOTION FOR LEAVE TO PROCEED IN THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ANTHONY BROOKS,

Petitioner

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT OF ATTORNEY IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, George H. Kendall, being first duly sworn, deposes and states that I am the attorney for the petitioner in the above entitled matter, that in support of petitioner's motion to proceed in this action for a writ of certiorari to the Supreme Court of Georgia without being required to prepay fees, costs or give security therefor, I state that because of petitioner's poverty he is unable to pay the costs of said proceeding or to give security therefor.

I further swear that the information stated below regarding the ability of petitioner to pay the costs of proceeding herein are true:

1. The petitioner is not presently employed. He has been incarcerated since July 1977. Prior to that time, petitioner had various odd jobs, but no regular employment.

2. Petitioner has received within the past twelve months no income from a business, profession or other form of self-employment. He has received nothing in the form of rent payments, interest, dividends or moneys from any other source.

3. Petitioner has no cash and has no checking or savings account.

4. Petitioner owns no real estate, stocks, bonds, notes, automobiles, or other valuable property excluding ordinary household furnishings and clothing.

5. There are no persons who are dependent upon the petitioner for support.

George H. Kendall

Subscribed and sworn to before me this 20th day of July, 1982, by George H. Kendall.

Notary Public

My Commission Expires May 14, 1987

BC cwv

NO. 82-5090

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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9

QUESTIONS PRESENTED

1.

Did the trial court err in refusing to grant the motion for change of venue?

2.

Was the closing argument of the prosecuting attorney improper?

3.

Were the statutory aggravating circumstances which existed in the petitioner's case properly instructed by the trial court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.	i
STATEMENT OF THE CASE.	1
REASONS FOR NOT GRANTING THE WRIT	
I. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT THE MOTION FOR CHANGE OF VENUE.	4
II. THE CLOSING ARGUMENT OF THE PROSECUTING ATTORNEY WAS PROPER.	8
III. THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH EXISTED IN PETITIONER'S CASE WERE PROPERLY INSTRUCTED BY THE TRIAL COURT.	10
CONCLUSION.	16
CERTIFICATE OF SERVICE.	17

TABLE OF AUTHORITIES

Cases Cited:

Brooks v. State, 244 Ga. 574, 261 (1979). 1, 2, 5, 10

Donnelly v. DeChristoforo, 416 U.S. 637 (1974). 8

Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). . . . 8

Godfrey v. Georgia, 446 U.S. 420 (1980). 2

Irvin v. Dowd, 366 U.S. 717 (1961). 4, 5

Murphy v. Florida, 421 U.S. 794 (1974). 5, 7

Rideau v. Louisiana, 373 U.S. 723 (1963). 6

Stroble v. California, 343 U.S. 181 (1951). 6

Statutes:

Ga. Code Ann. § 27-2534.1(b)(7). 12, 13, 14, 15

Ga. Code Ann. § 27-2534.1(b)(2). 13

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, William Anthony Brooks, was convicted in the Superior Court of Muscogee County, Georgia, for the kidnapping, rape, armed robbery and murder of Carol Jeannine Galloway. The jury found two statutory aggravating circumstances: (1) the murder was committed while the offender was engaged in the commission of rape and armed robbery and (2) the murder was outrageously or wantonly vile, horrible, or inhuman.

Brooks' convictions and sentences[1/] were affirmed by the Supreme Court of Georgia in Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). The evidence, set forth in detail in the appellate decision, showed that Brooks accosted Miss Galloway, age 23, at gunpoint in the front yard of her parents' residence and, at gunpoint, ordered her to get into her car and drive away.

> . . . [Brooks] ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20.00 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask

---

1/ Brooks was sentenced to death for murder, to life for kidnapping and rape, and to twenty years for armed robbery.

> Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream. When she did not heed his warning to stop, the appellant, to impress upon Miss Galloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death.

Id. at 575. Brooks fled, and was not captured for almost one month. After arrest, he confessed to the crimes and his confessions were introduced into evidence. Id.

Brooks petitioned this Court for a writ of certiorari; on May 27, 1980, the Court granted the petition, vacated that portion of the judgment affirming the death penalty, and remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). On remand, that court reexamined the imposition of the death penalty and reaffirmed Brooks' sentence of death. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980).

Following the reaffirmance of his death penalty, Brooks filed a second petition for a writ of certiorari which was denied.

Thereafter, he filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, upon which relief was denied. The Supreme Court of Georgia denied the certificate of probable cause to appeal and this petition ensued.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT THE MOTION FOR CHANGE OF VENUE.

The first of three reasons proffered by petitioner in seeking the writ is that the trial court committed error in refusing to grant the motion for change of venue. This issue was presented on direct appeal and again to the state habeas court. In the brief filed in this Court, petitioner does nothing more than refer to numerous newspaper articles dealing with the murder. Based upon these newspaper articles, petitioner contends that the "due process standard" in Irvin v. Dowd, 366 U.S. 717 (1961) has been violated. In effect, petitioner would have this Court abandon, for purposes of deciding this case, its established test for determining the impartiality of a juror and apply instead an exclusionary rule; that is, any juror who has read newspaper accounts or heard television and radio accounts of the crime should be excluded from jury service even though that juror states that he can determine guilt or innocence based solely upon the evidence adduced at trial. Almost 500 pages of voir dire transcript plainly show that the jurors finally selected were neither biased nor partial. Indeed, the process in selecting the jurors was painstaking.

As noted by the Supreme Court of Georgia on direct appeal, the motion for change of venue was supported by the introduction into evidence of 26 articles published by two Columbus newspapers between July 15, 1977, the date of commission of the crime, and August 23, 1977, twelve days after Brooks had been arrested.

"The record contains no article published during the two and two-thirds months immediately preceding [Brooks'] trial on Nov. 15, 1977; however, the transcript reflects that one article was published on Nov. 14, 1977, the very eve of the trial, wherein it was restated that [Brooks'] had confessed to the indicted crimes. . . ." Brooks v. State, 244 Ga. 574, 576, 261 S.E.2d 379 (1979).

In its lengthy treatment of this issue on direct appeal, the Supreme Court of Georgia recognized that in order to establish a denial of the Sixth Amendment right to an impartial jury, one must establish (1) actual juror partiality or (2) circumstances inherently prejudicial to that right. 244 Ga. at 577; Murphy v. Florida, 421 U.S. 794, 803 (1974).

First addressing the issue of actual juror partiality, and relying on Irvin v. Dowd, supra, the Supreme Court found that

> . . . all twelve selected jurors testified on voir dire that they were without a fixed opinion as to [Brooks'] guilt or innocence. [Brooks] protests, however, that this formal declaration of impartiality was impeached, in the case of one juror, by her admissions that she held an "undecided opinion" as to [Brooks'] guilt based upon newspaper accounts of the Columbus police department's certainty that [Brooks] was Miss Galloway's assailant. This same juror, however, testified in explanation of the above that she understood the police made mistakes and that

her "undecided" opinion would not preclude her from deciding [Brooks'] guilt or innocence solely on the evidence presented at trial.

Id. at 577.

As petitioner does before this Court, in the Supreme Court of Georgia he emphasized the "sheer number of newspaper publications (26), [and] the publication of parts of his confession. . . ." Id. at 578. As the Supreme Court of Georgia found, the pattern of pretrial publicity in the present case is very much like that in Stroble v. California, 343 U.S. 181 (1951), in which the allegedly inflammatory newspaper accounts appeared some six weeks before the beginning of the trial. As in Stroble, in the present case "there is no affirmative showing that community prejudice ever existed or in any way affected the deliberation of the jury." Therefore, among the factors to be considered are the absence of any evidence of actual juror prejudice, the remoteness in time between publicity and trial, and the eventual admission of the confession into evidence. Id. at 579.

Finally, the Supreme Court of Georgia considered Rideau v. Louisiana, 373 U.S. 723 (1963), cited by petitioner. In Rideau, a confession was televised three times approximately two months before the trial and the confession was never admitted into evidence. It was found that this did demonstrate inherent prejudice. However, the Rideau court "made clear the continued vitality of Stroble, and the limited holding of Rideau." Id. at 580.

Thus, in order to invoke the Sixth Amendment's presumption of juror partiality on the basis of inherently prejudicial pretrial publicity, Brooks must show "a trial atmosphere utterly corrupted by press coverage." Murphy v. Florida, 421 U.S. at 798.

In its order, the Superior Court of Butts County, Georgia, sitting as the state habeas court, concluded that because the State Supreme Court had ruled on this issue no further review was permissible.

It is evident that although petitioner is dissatisfied with the result of his trial, he is unable to establish any federal constitutional violation by the trial court's refusal to grant his motion for change of venue. On the contrary, the record clearly demonstrates that the jury ultimately selected was fair and impartial. The first ground presents no basis for granting the writ.

II. THE CLOSING ARGUMENT OF THE PROSECUTING ATTORNEY WAS PROPER.

In his second enumeration, petitioner contends that the "closing argument given by the prosecutor at the sentencing phase of petitioner's trial was a catalogue of virtually every improper, irrelevant, inflammatory and prejudicial argument which can be made in a criminal trial." Brief at 12.

The state habeas court considered at the outset that the state supreme court had conducted its sentence review and determined that the death penalty was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Habeas order at 18. Reviewing the particular argument, the state court concluded that the prosecutor may argue for a death sentence and offer plausible reasons for his position, that he may urge severe punishment, and that protection of the community is one consideration a jury is entitled to entertain in determining an appropriate sentence. "The Court has examined the prosecutor's closing argument (T. 859-873) and found nothing improper." State habeas order at 19. The closing argument of the prosecutor was not improper and he did not exceed permissible bounds in urging the appropriate penalty to be imposed by the jury. Furthermore, allegations of improper jury argument and misconduct by the prosecution do not present a claim of constitutional magnitude cognizable in federal court unless such arguments and conduct, taken as a whole and in the context of the entire trial, are so prejudicial as to render the state court trial fundamentally unfair within the meaning of the due process clause of the Fourteenth Amendment. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). A dintinction must be made between conduct of the prosecutor which is improper or unwarranted but is not a denial of due process. See Easter v. Estelle, supra at 760.

In summary, it is not disputed that the prosecutor eloquently urged for the imposition of the death penalty; as the representative of the people, having determined the facts of this case warranted seeking the death penalty it was not only his privilege but his duty, within the bounds of the law, to persuade the jury that the evidence before them supported imposition of the death penalty. However, to characterize this argument as improper, much less to label misconduct, is perhaps best attributed to zealous efforts to evade the death penalty. Such labels certainly do not have their genesis in the evidence before this Court.

III. THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH EXISTED IN PETITIONER'S CASE WERE PROPERLY INSTRUCTED BY THE TRIAL COURT.

In his final enumeration, Petitioner complains of the lack of guidance in the trial court's instructions to the jury. This issue has previously been presented to the Court in Brooks v. Georgia, Case No. 80-5850, in which this Court denied the petition for a writ of certiorari. However, for the Court's convenience in reviewing the issue, it will be addressed briefly herein.

A review of the trial court's sentencing instructions shows a thorough and accurate charge to the jury. The trial court instructed:

> . . . Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.
>
> Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt. . . .

(T. 885). After instructing the jury on the pertinent statutory aggravating circumstances, the trial court continued:

Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.

On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and the circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

> Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.
>
> * * *
>
> Now, ladies and gentlemen, even though you find Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

(T. 886-88). The jury was plainly instructed that it could recommend a sentence of death only if it found statutory aggravating circumstances. The jury was further instructed that even if it found such circumstances it need not impose the death penalty and it could in its discretion recommend mercy. Finally, the jury was told that unless aggravating circumstances existed, a life sentence only could be imposed. One cannot imagine a more explicit and correct instruction to the jury on its role under the Georgia death penalty statute.

Petitioner also contends that Ga. Code Ann. § 27-2534.1(b)(7) was inadequately charged to the jury. The entire circumstances surrounding the applicability of Ga. Code Ann. § 27-2534.1(b)(7) were considered on remand by the Supreme Court of Georgia, which found the following:

> Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of

death for the murder of Carol Jeannine Galloway.

First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27-2534.1(b)(7), but also on Code Ann. § 27-2534.1(b)(2) (The jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

"Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 599 (261 SE2d 349)(1979).

Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27-2534.1 (b)(2) was supported by legally sufficient evidence.

Moreover, in the present case, the jury found that the appellant's murder of Ms. Galloway reflected, beyond a reasonable

doubt, "depravity of mind" under Code Ann. § 27-2534.1(b)(7) and "when only facts occurring prior to death are relied upon . . ., the fact that the victim was tortured will . . . support a finding of depravity of mind . . ." Hance v. State, 245 Ga. 856 (268 SE2d 339)(1980).

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra; Hance v. State, supra.

In the present case, the victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood.

Also, it is beyond question that the appellant seriously and sexually abused Ms. Galloway. See Hance v. State, supra (physical abuse includes sexual abuse for purposes of proving torture under Code Ann. § 27-2534.1(b)(7).

Finally, following his rape of Ms. Galloway, the appellant taunted his victim with her lost virginity and

made her the target of his gun, said acts combining to cause her to scream uncontrollably. See Hance v. State, supra. (physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm).

Accordingly, this court reaffirms the appellant's sentence of death on the ground that, unlike the jury's finding of Code Ann. § 27-2534.1(b)(7) in Godfrey v. Georgia, supra, the jury's finding of said statutory aggravating circumstance in the present case was supported by legally sufficient evidence.

246 Ga. at 263-64.

Thus, it is plain that the jury was properly instructed and that the instruction as well as all circumstances surrounding imposition of the death penalty were properly and fully considered by the Supreme Court of Georgia.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

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This 1st day of September, 1982.

Daryl A. Robinson
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